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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION BY THE NATIONAL RAILWAY LABOR CONFERENCE FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under § 2 Ninth of the Railway Labor Act, representatives of crafts or classes of employees are certified on a system-wide basis. Pre-existing certifications issued on carriers that are merged or consolidated may no longer reflect the choice of a majority of the employees in the applicable craft or class of the merged carrier or system, as § 2 Fourth of the Act requires. The National Mediation Board adopted procedures to assure compliance with § 2 Fourth, under which a carrier notifies the Board of a merger and the Board, if it determines after an investigation that a merged system exists, determines the representative (if any) chosen by a majority of the employees in each system-wide craft or class. The Board subsequently applied those procedures on the Burlington Northern Railroad to make such determinations.

1. Particularly in view of the decisions in *Switchmen's Union* v. *Board,* 320 U.S. 297 (1943), and *Railway Clerks* v. *Employees Assn,* 380 U.S. 650 (1965), are the merits of those procedures reviewable by the courts either directly or as applied on the Burlington Northern?

2. If the merits of those procedures are reviewable, does the Railway Labor Act prohibit the National Mediation Board from adopting or applying procedures under which the Board in its discretion may, upon request by a carrier or *sua sponte,* investigate whether a merger has occurred or will occur and, if so, determine who are the representatives of the merged system-wide crafts or classes chosen by the majority of the employees in each such craft or class?

LIST OF PARTIES BELOW

The parties to the proceeding in the court of appeals at the time of the decision below were as follows:

Appellees

National Mediation Board
National Railway Labor Conference
Burlington Northern Railroad Company

Appellants

American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Hotel Employees and Restaurant Employees International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Longshoremen's Association
National Marine Engineers' Beneficial Association
Seafarers International Union of North America
Sheet Metal Workers' International Association *

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* American Railway and Airway Supervisors Association, Brotherhood of Railway Carmen, Transportation•Communications International Union, Transport Workers Union of America, and United Transportation Union appealed the decision by the District Court but withdrew their appeals.

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PETITION BY THE NATIONAL RAILWAY LABOR CONFERENCE FOR WRIT OF CERTIORARI

Petitioner National Railway Labor Conference ("NRLC") respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, *en banc*, in this case.*

OPINIONS BELOW

The Opinion for the Court of Appeals (Edwards, J.), *en banc*, the concurring opinion (Randolph, J.), and the dissenting opinion (Williams, J.), issued on July 19,

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* Pursuant to Rule 29.1, the NRLC states that it is an unincorporated association and has no subsidiaries or affiliates.

1994, are reported at 29 F.3d 655, and are set forth in App. A hereto. An Order, issued *sua sponte* by the Court on July 20, 1994 (App. B), amended the opinion for the Court and the dissenting opinion to note that Judges Silberman, Douglas Ginsburg, and Henderson joined the dissent so that the decision was by a 5 to 4 majority of the *en banc* Court. The March 9, 1993 opinion for the panel (Ruth Bader Ginsburg, J.), together with a concurring opinion (Edwards, J.) and a dissenting opinion (Williams, J.), vacated when the Court granted a rehearing *en banc*, are reported at 988 F.2d 133, and are set forth in App. C.

The unreported June 10, 1991 Memorandum Opinion and Order by the District Court dismissing the Complaint in Civil Action No. 89-3306 is set forth in App. D. The unreported July 3, 1991 Order by that Court denying plaintiffs' motion to alter or amend judgment is set forth in App. E. The decision of the National Mediation Board ("NMB" or "Board") in *Procedures for Handling Representation Issues, Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (Nov. 27, 1992), is set forth in App. F. The unreported September 12, 1991 Order by the District Court dismissing the Complaint in related Civil Action No. 91-1135 is set forth in App. G. The decision of the NMB in *Burlington Northern Railroad Co.*, 18 N.M.B. 240 (Apr. 23, 1991) is set forth in App. H.

JURISDICTION

The judgment of the Court of Appeals following rehearing *en banc* was entered on July 19, 1994. No petition for rehearing was filed. The NRLC's time in which to file this petition was extended to and including November 16, 1994 by an Order of the Chief Justice dated October 12, 1994. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Railway Labor Act:

Section 2 Fourth, 45 U.S.C. § 152 Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this Act. * * * *

Section 2 Ninth, 45 U.S.C. § 152 Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representative in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the em-

ployees who may participate in the election. The Board shall have access to and shall have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purpose and provisions of this paragraph.

Administrative Procedure Act:

5 U.S.C. § 701(a):

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of final agency action. * * * *

STATEMENT OF THE CASE

The Railway Labor Act (RLA) governs labor-management relations in the railroad and airline industries. Under § 2 Fourth, the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class," 45 U.S.C. § 152 Fourth. Under § 2 Ninth, the National Mediation Board ("NMB") has the "duty . . . upon request of either party to the dispute" to investigate "any dispute . . . among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of" the Act; and, if the NMB determines after an investigation by any "appropriate

method" that the majority of a craft or class have chosen a representative, it shall "certify the same to the carrier" which "shall treat with the representative so certified as the representative of the craft or class under the RLA." 45 U.S.C. § 152 Ninth.

As construed by the NMB from its outset in 1934, the appropriate craft or class for representation extends to all employees in the craft or class throughout a carrier system, including where two or more technically separate carriers are operated as a single system.[1] In *Switchmen's Union* v. *Board*, 320 U.S. 297 (1943), this Court held that the courts do not have jurisdiction to review the merits of that interpretation and its application by the NMB to certify a system-wide representative. When one carrier is merged into or acquired by another, existing certifications on components of the merged system do not reflect a choice by a majority of the merged craft or class as § 2 Fourth requires; thus, any pre-merger representative no longer has been "designated and authorized in accordance with the requirements of" the Act as § 2 Ninth requires.

Section 2 Ninth empowers the NMB "to obtain" from the carriers and to "utilize such information as may be deemed necessary by it to carry out the purposes and provisions of" that secton; and otherwise is silent as to the extent, if any, to which a carrier may participate in the determination of representation issues under § 2 Ninth. This Court has concluded that "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board," in holding that carriers did not have a statutory right to be a party to a proceeding under § 2 Ninth. *Railway Clerks* v. *Em-*

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[1] See First Annual Report of the National Mediation Board (1935) at 22. The relevant provisions in §§ 2 Fourth and Ninth were enacted, and the NMB was established, by 1934 amendments to the RLA. 48 Stat. 1185, 1186-89, 1193-95.

ployees Assn, 380 U.S. 650, 666-67 (1965). At one time, the NMB did not permit a carrier to request an investigation of a representation dispute. "This practice greatly limited the representation questions brought to the Board's attention to those raised by the labor organizations." *Grand Trunk W. R.R.,* 17 N.M.B. 282, 298 (1990).

As the unions on merged carriers often were content to retain pre-merger representation rights rather than risk a system-wide determination, a merged carrier dealt with multiple employee representatives who did not purport to speak for, or have authority to bind, all of the employees in the system-wide craft or class. When mergers began to occur in the airline industry, the NMB reexamined this matter and concluded that "a long history of mergers and acquisitions" in the railroad industry had resulted in a "pattern of representation" that "has, in the Board's judgment[,] led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of the railroads to integrate operations and manage a single rail system." *Republic Airlines,* 8 N.M.B. 49, 54-55 (1980). This subsequently was exemplified by the chaotic pattern of representation on the Burlington Northern Railroad ("BN") revealed by the investigation that is the subject of one of the two consolidated appeals in the court below. See pp. 7-8, *infra.*

In *Republic Airlines,* the Board held that "all certifications" for representation of Airwest employees "were extinguished by operation of law upon Airwest's acquisition by Republic." 8 N.M.B. at 56. Some air carriers thereafter determined that NMB certifications had been extinguished by an operational merger, and several courts of appeals "held that the question whether a union's certification survives [a] . . . merger is a matter within the exclusive jurisdiction of the NMB." *Association of Flight Attendants* v. *Delta Air Lines,* 879 F.2d 906, 912 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1065 (1990), citing cases. The Board made clear that it had not intended to

give the carriers "independent authority to extinguish existing certifications," as it "has *exclusive* authority to grant, withhold and revoke representation certifications." *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218, 233, 235 (1987) (original emphasis). But the Board also recognized a need for "new procedures governing representation issues in mergers and acquisitions," and prescribed interim procedures under which "carriers involved in a merger, acquisition or consolidation will be permitted to invoke the Board's services for determination of whether any NMB certifications have been terminated." *Id.* at 241-42.

After soliciting and considering comments by interested persons, the NMB adopted permanent Airline Procedures on July 31, 1987, in *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. 388; and the permanent Railroad Procedures, on November 27, 1989, that are at issue in this case. For the most part, those procedures are identical. Among other things, the carriers are required to "notify" the NMB when an application for approval of a merger is filed with the applicable regulatory agency (the ICC as to the railroads), and rail carriers "which have previously merged may notify the NMB that the merger[s] had occurred." App. F at 96a. Incumbent unions may file written comments, the NMB investigates in the form required by the circumstances and, if it determines that an operational merger will occur or has occurred, proceeds to determine representation of the system-wide crafts or classes. See App. F at 97a-98a.

In its decision with respect to representation on the BN, which also is involved here, the NMB determined that the BN consisted of 11 formerly independent railroads which now constitute a single transportation system; and that no certifications had been issued as to the BN itself but approximately 85 ("dating from 1934 to

1976") had been issued on one or more predecessors of the system. All certifications on the predecessor railroads were extinguished and, since the Board was able to determine that a majority exists in each craft or class, it certified a named union to represent each such craft or class on a system-wide basis. See App. H at 114a-115a, 122a-129a.

Respondents sought to invalidate the Railroad Procedures in a suit against the NMB alleging that jurisdiction existed under 28 U.S.C. §§ 1331 and 1337(a); the NRLC and the BN intervened as defendants; and the District Court dismissed the complaint as involving "precisely the kind of dispute that is within the unreviewable discretion of the NMB" under *Switchmen's Union* and its progeny. App. D at 83a-86a. Respondents filed a separate action against the NMB with regard to the application of those Procedures on the BN; the BN intervened as a defendant; and the District Court dismissed the complaint "for the reasons expressed" in the other case. App. G at 103a-106a. The appeals from those decisions were consolidated by the Court of Appeals, and a panel reversed the decisions by the District Court and "remanded for the entry of declaratory judgments for appellants consistent with [its] opinion," over a dissent by Judge Williams. App. C at 70a.

After granting rehearing *en banc*, the full Court of Appeals issued the 5 to 4 decision that this Court is here requested to review. In what is denominated as the Opinion for the Court, Judge Edwards concluded that the *Switchmen's Union* doctrine, as interpreted in *Leedom* v. *Kyne*, 358 U.S. 184, 189-90 (1958), did not preclude judicial review since "the Merger Procedures present a question of the Board's very jurisdiction—a question that is analytically distinct from and *antecedent to* the issue of whether the Board has correctly found the 'fact' of representation." App. A at 12a (emphasis in the original). In a "concurrence" joined by all five members of

the majority, Judge Randolph concluded that "the APA and not *Switchmen's,* controls" review of the Procedures. App. A at 32a. Although *"Switchmen's* interpreted the Railway Labor Act to bar judicial review of Board adjudications," in his view "that interpretation and the reasons behind it do not reach the Board's rulemaking in this case." App. A at 33a.

On the merits, Judge Edwards concluded for the majority that "the Board may investigate a representation dispute *only* upon request of the employees involved in the dispute" and that for the Board to do so either at the request of a carrier or *sua sponte* "is for the Board blatantly to exceed its statutory authority." App. A at 16a (emphasis in the original). The majority refused to give any deference to the NMB's interpretation because, in its view, " 'Congress has directly spoken to the precise question at issue' " in the case " 'so there is no gap for the agency to fill.' " App. A at 29a. Judge Randolph "fully agree[d]" with this aspect of the Edwards opinion. App. A at 34a.

The Court remanded the case arising from the adoption of the Railroad Procedures "for entry of declaratory and injunctive relief in favor of appellants"; and remanded the case arising from the application of those procedures on the BN "for reconsideration in light of the new judgment" in the other case. App. A at 30a. The dissenters understood that this disparity was because Judge Randolph's concurrence basing reviewability upon the Administrative Procedure Act (APA), with his "distinction between rulemaking and adjudication," governed the "outcome" of that issue. App. A at 35a.

REASONS FOR GRANTING THE WRIT

The NRLC is an unincorporated association whose members include most of the nation's Class I railroads, which it represents in collective bargaining with unions representing their employees, and with respect to other labor relations issues of concern to the railroads generally. All of the major railroad systems are the end product of prior mergers and acquisitions, but the unions often have insisted that the merged system bargain with a general chairman representing only employees on a premerger component of the system, pursuant to a pre-merger certification, even where the same union had been certified or recognized on each such predecessor of the system. As the NMB concluded, the resulting fragmentation of representation "led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of the railroads to integrate operations and manage a single rail system." See p. 6, *supra*.

Because the validity of the NMB's Merger Procedures thus is of great importance to the NRLC and member railroads, the NRLC intervened as a defendant below in the suit seeking to invalidate those procedures. The decision invalidating those procedures raises important issues that should be reviewed by this Court. Those issues affect the airline industry as well as the railroad industry and have even broader implications as we show below. Before doing so, however, we demonstrate that the decision conflicts with the *Switchmen's Union* doctrine as established and applied by this Court and as applied by other appellate courts including the Sixth Circuit in the only other appellate decision involving the Merger Procedures, and is otherwise erroneous.

I. THE MERITS OF THE NMB'S REPRESENTATION PROCEDURES ARE NOT JUDICIALLY REVIEWABLE.

The *Switchmen's Union* doctrine was reaffirmed and applied by this Court, in the light of *Leedom* v. *Kyne* and the APA, in *Railway Clerks* v. *Employees Assn, supra.*

Neither the reason asserted by Judge Edwards nor the reason asserted by Judge Randolph for avoiding the application of that doctrine here and reviewing the merits of the merger procedures can withstand examination in the light of those decisions by this Court.

A. The "Jurisdictional" Approach by Judge Ewards Conflicts With the *Switchmen's* Union Doctrine as Applied by This Court and Other Appellate Courts.

Judge Edwards concluded that, because § 2 Ninth imposes a duty upon the NMB to investigate a representation dispute upon request of a party to a dispute, the Board does not have "jurisdiction" to investigate at the request of a carrier or *sua sponte*; and that *Switchmen's Union* does not preclude review of such "jurisdictional" issues.[2] This is flatly contrary to *Switchmen's Union*, which involved a similar issue. In that case the NMB, after an investigation, determined that the New York Central and certain railroad subsidiaries constituted a single system, certified a representative of a system-wide craft, and terminated representation by another union on parts of that system. That union contended that "the two lines" on which it represented employees were "separate carriers" as that term is defined in the RLA, and thus for purposes of § 2 Ninth which, in terms, provides for investigation of disputes "among a carrier's employees," and for certification of a representative "to the carrier." In effect, therefore, the union contended that the Board did not have jurisdiction to certify a representative for a multi-carrier system-wide craft. See *Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785, 788-89 (D.C. Cir. 1943), *rev'd*, 320 U.S. 297 (1943), which reached the merits of that contention and concluded that the NMB had not abused its discretion.

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[2] But see *Pro. Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 460 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (a "negative implication" from affirmative statutory language does not cross "this lofty threshold" for judicial review under the *Switchmen's Union* doctrine).

This Court held, however, that the courts do not have power to "reach the merits of the controversy" and review the action of the NMB. 320 U.S. at 300. The Court of Appeals similarly erred here. The fundamental issue in both cases was whether procedures adopted by the NMB for the exercise of its jurisdiction under § 2 Ninth violated that provision. Of course, a court that concludes that the NMB erred can always say that the Board exceeded its "jurisdiction." As Judge Williams stated, in "the absence of a manageable line between jurisdictional and other issues, non-deference for 'jurisdictional' issues is just a tag for the court's conclusion." App. A at 40a. Such an approach in effect nullifies the *Switchmen's Union* doctrine and should have been rejected by the court below as it was by this Court in *Switchmen's Union*. Indeed, other appellate courts have applied that doctrine even where coverage by the RLA is in issue.[3]

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[3] The RLA expressly defines "carrier" and "employee" as "used in" and "for the purpose of" the Act. 45 U.S.C. §§ 151 First and Fifth. The Second Circuit applied the *Switchmen's Union* doctrine to review of determinations by the NMB as to whether an individual is an "employee" eligible to vote in a representation election under § 2 Ninth, in *Virgin Atlantic Airways* v. *Nat. Mediation Bd.*, 956 F.2d 1245, 1250-51 (2d Cir.), *cert. denied*, 113 S. Ct. 67 (1992). *Accord*, *Pro. Cabin Crew Ass'n* v. *National Mediation Bd.*, *supra*, 872 F.2d at 459-63. The Seventh Circuit applied that doctrine to review of a determination by the NMB that a company was a "carrier" subject to § 2 Ninth. *Chicago Truck Drivers, Etc.* v. *Nat. Mediation Bd.*, 670 F.2d 665, 669-70 (7th Cir. 1981). But see *Delpro Co.* v. *Brother. Ry. Carmen of U.S. & Canada*, 676 F.2d 960, 962-63 (3d Cir.), *cert. denied*, 459 U.S. 989 (1982); *International Long. Ass'n* v. *North Carolina Ports Auth.*, 463 F.2d 1, 3 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972). See, also, *United States* v. *Feaster*, 410 F.2d 1354, 1359-64 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969). Plainly, determinations of whether a company or individual comes within the coverage of the RLA are more "jurisdictional" in nature than determinations by the NMB as to the scope or manner of exercising its powers under § 2 Ninth with respect to covered carriers and employees.

Leedom v. *Kyne* does not change that conclusion. The relationship between the *Switchmen's Union* and *Leedom* v. *Kyne* doctrines was explained by this Court in *Railway Clerks*, 380 U.S. at 659-60, as follows:

> It is sometimes said that in *Leedom* v. *Kyne* . . . , the Court created an 'exception' to the doctrine of *Switchmen's Union*. . . . But this was no exception to *Switchmen's Union*. Rather the Court was careful to note that '[t]his suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act*' (original emphasis).

Here, the NMB adopted its merger procedures as an exercise of its jurisdiction under § 2 Ninth, which does not contain a "specific prohibition" of an investigation by the Board of a representation dispute either at the request of a carrier or *sua sponte*. The fact that review also may be available under *Leedom*, if an agency violates "a specific affirmative command," does not mean that where a prohibition is in issue, as here, it need not be specific (see App. A at 9a and p. 15, *infra*.).

B. The APA Approach by Judge Randolph Conflicts With the *Switchmen's Union* Doctrine as Applied by This Court and Other Appellate Courts and Misapplies the APA.

Judge Randolph's approach to reviewability is equally erroneous. Under that approach, *Switchmen's Union* applies only to review of certifications by the NMB, and thus has no application at all to review of the merger procedures adopted by the Board—which thus are reviewable under § 704 of the APA. That approach is unpre-

cedented, substantially eviscerates *Switchmen's Union*, and misapplies the APA.[4]

In *Switchmen's Union*, the Board's certification was claimed to be invalid only because of the claimed invalidity of its procedure to investigate and certify on a system-wide basis. The Court concluded that the right of a majority of a craft or class to select a representative was "protected by § 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it" and did not provide for judicial review. 320 U.S. at 300-01. The Court reiterated "our conclusion" in a companion case, *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 333 (1943), "that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U.S. at 302. The Court considered (and rejected) the "fact that the certificate of the Mediation Board is conclusive" as a possible "ground for judicial review," not as a deterrent to such review. 320 U.S. at 303.

As the court below once concluded, therefore, "*a fortiorari* if the district courts have no jurisdiction to review both a determination of craft or class and a certification, as in the *Switchmen's Union* case, they have no jurisdiction to review a craft or class determination alone." *United Transp. Serv.* v. *National Mediation Board*, 179

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[4] Judge Randolph appears to concede that, if the *Switchmen's Union* doctrine is applicable, the APA is inapplicable. Section 701(a) of the APA excepts from review thereunder agency action as to which "statutes preclude review" or that "is committed to agency discretion by law." *Switchmen's Union* established that the RLA precludes review of actions by the NMB under § 2 Ninth and committed protection of the § 2 Fourth right to the discretion of the NMB. As the dissent below noted (App. A at 36a-37a), *Switchmen's Union* was cited in the Attorney General's Manual on the Administrative Procedure Act (1947) as an example of "the category classified as unreviewable under the APA." *Accord, Virgin Atlantic Airways* v. *Nat. Mediation Bd., supra*, 956 F.2d at 1250.

F.2d 446, 450 (D.C. Cir. 1949). So, too, the Second Circuit rejected an "attempt to distinguish the *Switchmen's* case on the basis that there has as yet been no certification," in *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 253 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). Judge Randolph's conclusion that *Switchmen's Union* does not apply to review of the Board's merger procedures is irreconcilable with that decision as well as with the basis for the *Switchmen's Union* decision.

Moreover, this Court's decision in *Railway Clerks* demonstrates that the APA did not supplant or limit the *Switchmen's Union* doctrine. The district court had enjoined use of the form of ballot prescribed by the NMB in its rules for an election under § 2 Ninth, in an opinion which was adopted by the Court of Appeals. *Association for Ben. of Non-Contract Emp.* v. *National Med. Bd.*, 218 F. Supp. 114 (D.D.C. 1963), *aff'd per curiam on basis of opinion below sub. nom. United Airlines, Inc.* v. *National Mediation Board*, 330 F.2d 853 (D.C. Cir. 1964), *aff'd*, 380 U.S. 650 (1965). According to that opinion, "a fundamental change had been brought about by the enactment, subsequent to Switchmen's Union, of the" APA so as to permit review of NMB actions under § 2 Ninth that raise "serious issue[s] of statutory construction," 218 F. Supp. at 124-25. This Court reversed, without even bothering to mention the APA, with the "principles in mind" of *Switchmen's Union* and *Leedom* v. *Kyne*. 380 U.S. at 658-60. "Unable to point to any specific requirement for a 'no union' ballot in the Act," the respondents were "left to arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide," which "are matters for Congress and the Board rather than the courts." 380 U.S. at 671.

Even if applicable, § 704 of the APA provides for review of agency action "made reviewable by statute and final agency action"; and further provides that "preliminary, procedural, or intermediate agency action or ruling

not directly reviewable is subject to review on the review of the final agency action." The NMB's Merger Procedures are "procedural" agency action that is preliminary or intermediate to the application of those procedures in a certification investigation. No one is affected by those procedures until they are applied, so they are not " 'ripe' for judicial review under the APA" until applied in a final certification decision. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 891-92 (1990). Thus, Judge Randolph's distinction between "adjudication" and "regulation," for purposes of review under the APA, ignores the language of § 704 and the "ripeness" doctrine.[5]

C. Subsequent Legislative Developments Confirm This Court's Conclusion in *Switchmen's Union* that Congress Did Not Intend Judicial Review.

This Court's *Switchmen's Union* decision was "reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act." 320 U.S. at 305. "When Congress in §§ 3 and 9 [of the RLA] provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent." 320 U.S. at 306. That inference has been strengthen by subsequent developments.

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[5] Both the NMB and the NRLC contended in the district court that the validity of the Merger Procedures was not ripe for review, if reviewable at all, until and in the context of review of a certification thereunder (see App. D at 84a), citing *United States* v. *Feaster*, 410 F.2d 1354, 1364 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969); *American Air Export & Import Co.* v. *O'Neill*, 221 F.2d 829, 830 (D.C. Cir. 1954), among others. See, also, *Chicago Truck Drivers* v. *Nat. Mediation Bd.*, *supra*, 670 F.2d at 668-69. After the application of the procedures on the BN was attacked in a separate action and the appeals were consolidated, that contention appeared to be mooted until revived by Judge Randolph's distinction.

The provision in § 3 First for judicial review of arbitration awards was part of the same 1934 amendments that enacted § 2 Ninth. That provision authorized review only of monetary awards against a carrier, and did not authorize review of awards rejecting a claim or grievance. In *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-16 (1959), the Court held that the "disparity in judicial review . . . was explicitly created by Congress, and it is for Congress to say whether it ought to be removed." In a 1966 amendment, Congress provided for judicial review of such arbitration awards for both carriers and claimants, but limited to three specified grounds. 80 Stat. 208, 211; see 45 U.S.C. § 153 First (p) and (q). In *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 93-94 (1978), the Court held that "this statutory language means just what it says" so that an award was not reviewable except "for the three reasons specified" in the amended statute.

In thus amending the judicial review provisions of the RLA, Congress did *not* provide for any judicial review of actions by the NMB under § 2 Ninth or otherwise disturb the then established *Switchmen's Union* doctrine that the merits of such actions are not reviewable.[6] This sequence of events and this Court's decisions with respect thereto is a further confirmation "that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." See p. 14, *supra*. Both Judge Edwards and Judge Randolph, for the majority below, ignored that conclusion.

D. The Decision Below Conflicts With a Decision by the Sixth Circuit.

The majority decision below also conflicts with the only other appellate decision that involved the Merger Procedures. *Brotherhood of Maint. of Way Emp.* v.

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[6] A similar pattern of Congressional action was said to be "persuasive evidence of the adoption by that body of the judicial construction." *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936).

Grand Trunk, 961 F.2d 1245 (6th Cir. 1992). The NMB applied those procedures to certify system-wide representatives on the Grand Trunk system, and some of those unions sued for a declaratory judgment that the Grand Trunk nonetheless was required to bargain with General Committees on components of the merged system with respect to that part of the craft or class within the jurisdiction of a particular Committee. When the district court issued such a declaration, the Grand Trunk both appealed and petitioned the NMB to clarify its prior decision. The Board explained that it "envisioned that the Carrier and labor organizations would not continue to bargain along the lines of the extinguished certifications on the former lines," and had certified a "single representative for the entire system-wide craft or class on the GTW in order to enable bargaining to proceed along the newly-defined craft or class lines." *Grand Trunk W. R.R.*, 19 N.M.B. 226, 231-33 (1992).

The Sixth Circuit reversed the district court and remanded with directions to dismiss the unions' complaint with prejudice. 961 F.2d at 1250. It concluded, among other things, that the carrier's petition to the NMB was a "proper procedure," and that "the Board correctly determined that the matter presented to it in this case was a representation dispute, exclusively within its jurisdiction" so that the Board's decision was not reviewable under the *Switchmen's Union* doctrine. 961 F.2d at 1248-50. Hence, by certifying "the union that is the single representative for each craft or class of workers system-wide," the Board "has resolved the only dispute." 961 F.2d at 1250. This decision is incompatible with the majority decision below reviewing and invalidating the very procedures applied and clarified by the NMB in that case.[7]

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[7] The Airline Procedures were held to be unreviewable in *Teamsters* v. *NMB*, 136 L.R.R.M. 2193 (D.D.C. 1990). Cf., *Western Airlines Inc.* v. *Teamsters*, 480 U.S. 1301, 1305-07 (1987) (O'Connor, J., in Chambers), and cases there cited.

II. EVEN IF THE MERITS ARE REVIEWABLE, THE DECISION BELOW IS ERRONEOUS.

The majority of the Court of Appeals concluded that the plain language of § 2 Ninth so clearly precludes an NMB investigation of a representation dispute at the request of a carrier or *sua sponte* that the Board's determination to the contrary is not entitled to any deference by the courts. However, the fact that § 2 Ninth imposes upon the NMB a *duty* to investigate "upon request of either party to the dispute," does not speak to the issue of whether the Board in its discretion may permit a carrier to be a party to an investigation under § 2 Ninth, or to the power of the Board to act *sua sponte* to investigate the effects of a merger on representation of the resulting system-wide crafts or classes. As this Court stated in *American Trucking* v. *A., T. & S. F. R. Co.*, 387 U.S. 397, 411 (1967), there is "no basis for this vast leap from a particular authorization to a pervasive prohibition" such as was engaged in by the majority below.[8]

Moreover, the NMB is expressly empowered to obtain from the carriers "such information as may be deemed necessary by it to carry out the purposes and provisions" of § 2 Ninth. The Merger Procedures implement that authority by providing for carrier notification of mergers

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[8] This was true in *American Trucking* even though the agency had changed an interpretation it had maintained "for over 25 years"—that "railroad concurrence is essential for trucker use of TOFC services." 387 U.S. at 415. An agency "faced with new developments or in the light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact . . . , this kind of flexibility and adaptability . . . is an essential part of the office of a regulatory agency." 387 U.S. at 416. Hence, the reliance by the majority below on the NMB's past practice (App. A at 26a-28a) adds nothing significant.

or proposed mergers and related information that the Board deems to be necessary to carry out the purpose of § 2 Ninth to certify employee representatives on a system-wide craft or class basis. Any doubt about the Board's discretionary authority in that regard should have been dispelled by this Court's *Railway Clerks* decision.

The Court there concluded that, as a carrier does not have a statutory right to participate in proceeding under § 2 Ninth, "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely to the discretion of the Board." 380 U.S. at 666-67. In that case, the Board had "requested, received and considered statements from the carrier," and had "continued to correspond with [the carrier,] accepting and studying its detailed application for reconsideration of the Board's decision. . . ." 380 U.S. at 666. The majority below simply ignored this aspect of *Railway Clerks*. If the Board has discretion to authorize a carrier to petition for reconsideration of its decision in an investigation, surely it also has discretion to authorize a carrier to request an investigation. The decision to the contrary by the majority below clearly is wrong.

Moreover, it is most unlikely that Congress intended to preclude the NMB from acting *sua sponte* to assure that its certifications continue to comply with the requirements of the Act, as § 2 Ninth commands, even though notified that a merger has made that at least questionable in regard to pre-merger certifications. After all, as this Court stated in *Switchmen's Union* and reiterated in *Railway Clerks*, the purpose of § 2 Ninth is to protect the right, under § 2 Fourth, "of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.'" 380 U.S. at 659; 320 U.S. at 300-01. The validity of the Board's long-standing interpretation that such craft representation should be system-wide was not

questioned by respondents or by the court below. In the face of the burgeoning merger movement in the airline industry and upon reconsideration of the consequences of mergers in the railroad industry, the Board concluded that leaving to the unions the invocation of a representation investigation had undermined rather than protected the right of the majority of the employees in a system-wide craft to determine the representative of that craft or class. See p. 6, *supra*.

This Court stated in *American Trucking Assns* v. *United States*, 344 U.S. 298, 311 (1953), that it "is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violations of its provisions." We submit that it also "is an unnatural construction" of the RLA that would require the NMB "to sit idly by and wink at" evasions of the requirement in § 2 Fourth that representation certifications reflect the choice of the majority of the employees in a system-wide craft or class. The fact that Congress, when it enacted § 2 Ninth in 1934, chose without any explanation not to enact a much different bill for investigation of representation disputes between a carrier and its employees (see App. A at 21a-22a) does not demonstrate that the Congress intended to preclude a carrier from invoking or otherwise participating in an investigation of representation disputes among employees, or to preclude the NMB from investigating such disputes *sua sponte*. "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947). *Accord, Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989). But however, that may be, the *Railway Clerks* decision is sufficient in itself to demonstrate that the majority below erred in holding that the NMB does not have discretion to permit such participation by a carrier.

III. THE ISSUES ARE IMPORTANT.

We have already noted the importance of the Merger Procedures to collective bargaining in the railroad industry. See p. 10, *supra*. If the railroads cannot invoke an investigation of a representation dispute, presumably the airlines cannot do so either and the majority decision below also will lead to invalidation of the Airline Procedures as well, unless reversed by this Court. As Judge Williams noted (App. A at 38a), airline associations expressed concern as *amici* below that invalidation of the Airline Procedures would cast a cloud over the numerous applications of those procedures in the airline industry, could "dispute the stable post-merger collective bargaining relationships now in place," and would be even more significant as to the future since, before those procedures, carrier decisions "frequently resulted in unresolved disputes, litigation and potential disruption of airline operations." Fragmentation of system-wide crafts or classes into multiple bargaining units correspondingly multiplies the number of bargaining disputes that may lead to strikes disrupting rail or airline transportation.

Moreover, heretofore it has been "a truism," since *Switchmen's Union*, "that decisions and determinations of the National Mediation Board in resolving representation disputes under Section 2 Fourth and Ninth are discretionary and essentially unreviewable by the courts." *The Railway Labor Act at Fifty* (G.P.O. 1977), at 29. The double evisceration of the *Switchmen's Union* doctrine, by the "jurisdiction" approach of Judge Edwards and the "APA" approach of Judge Randolph thus undermines what hitherto has been the keystone to the determination of representation disputes under the RLA—the unreviewable discretion of the NMB. Unless reversed by this Court, the decision below will encourage other judicial challenges of NMB decisions with consequent delays in the finality of representation determinations. Hence, the decision below has importance outside of merger representation issues as well as with respect to those issues.

So, too, the expansive interpretation by Judge Edwards of *Leedom* v. *Kyne*, and the view expressed by Judge Randolph for the majority that agency procedures or regulations may be reviewed under the APA even though applications of those procedures or regulations are not reviewable, could affect the reviewability of actions by agencies other than the NMB and thus have widespread application.

We submit, therefore, that the majority decision by the Court of Appeals has decided "important question[s] of federal law" that should be "settled by this Court" as well as deciding them "in a way that conflicts with applicable decisions of this Court" and of other appellate courts. Rule 10.1(c) of this Court.

CONCLUSION

A writ of certiorari should be granted to review the *en banc* decision by a 5 to 4 majority of the Court of Appeals below.

Respectfully submitted,

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November 16, 1994

FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDICES TO PETITION BY THE NATIONAL RAILWAY LABOR CONFERENCE FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 9, 1994 Decided July 19, 1994

Nos. 91-5223 & 91-5310

RAILWAY LABOR EXECUTIVES' ASSOCIATION;
AMERICAN RAILWAY AND
AIRWAY SUPERVISORS' ASSOCIATION;
AMERICAN TRAIN DISPATCHERS ASSOCIATION;
BROTHERHOOD OF LOCOMOTIVE ENGINEERS;
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES;
BROTHERHOOD OF RAILROAD SIGNALMEN;
BROTHERHOOD RAILWAY CARMEN;
HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES
INTERNATIONAL UNION;
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS;
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIP BUILDERS, BLACKSMITHS,
FORGERS AND HELPERS;
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION;
NATIONAL MARINE ENGINEERS'
BENEFICIAL ASSOCIATION;
SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA;
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION;
TRANSPORT WORKERS UNION OF AMERICA;
TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION;
UNITED TRANSPORTATION UNION,
Appellants

v.

NATIONAL MEDIATION BOARD,
Appellee

BURLINGTON NORTHERN RAILROAD COMPANY;
NATIONAL RAILWAY LABOR CONFERENCE,
Intervenor Defendant-Appellees

Appeal from the United States District Court
for the District of Columbia

(No. 89-cv03306)

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* WILLIAMS.

EDWARDS, *Circuit Judge*: Under Section 2, Ninth of the Railway Labor Act ("RLA" or "Act"), the National Mediation Board ("NMB" or "Board") is given very limited authority to investigate representation disputes "among a carrier's employees." *See* 45 U.S.C. § 152 Ninth (1988). Such investigation is initiated only "upon request of either party to the dispute," and it is clear that a carrier is not a "party" under Section 2, Ninth. *Id.* Following investigation, the Board certifies "to both parties," and "to the carrier," the employees' designated bargaining agent. *Id.* Nothing in this statutory provision authorizes the Board to investigate or resolve a representation dispute either *sua sponte* or pursuant to a petition from a carrier; and for more than fifty years following the enactment of the RLA, the Board acted to address representation disputes *only* when it received requests from or on behalf of employees.

Despite the absence of any statutory authority, the Board announced in 1989 that carriers, as well as the Board itself, could initiate representation proceedings in

the wake of railroad mergers and acquisitions, on the theory that such events were likely to precipitate uncertainty as to the proper representation of employees. *See Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) ("Merger Procedures"). Appellants, a coalition of unions representing railroad employees, challenged the Merger Procedures as an illegal arrogation of authority not conferred by the Act. The District Court dismissed appellants' suit as unreviewable under *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943). On appeal, in an opinion by then-Judge Ruth B. Ginsburg, a divided panel of this court reversed, holding that judicial review was available and that the Board had exceeded its statutory authority. *See Railway Labor Executives' Ass'n v. NMB*, 988 F.2d 133 (D.C. Cir. 1993). Having accepted the Board's suggestion for rehearing *en banc*, we again reverse.

The Supreme Court has made clear both that the Board's authority under Section 2, Ninth is "exclusive" only "[*i*]*f* the present dispute falls within § 2, Ninth," *General Comm. of Adjustment v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323, 336 (1943) (emphasis added), and that the Board's role under Section 2, Ninth is very narrow. *See Switchmen's*, 320 U.S. at 304, 305. The Board does not even claim that the terms of Section 2, Ninth support the authority that it asserts, and it can point to no other provision in the RLA giving it the authority to promulgate the Merger Procedures. Instead, the Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying that the Board has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible. Because we find that the Board's attempt to expand its jurisdiction has no basis whatsoever in the language of the statute or its legislative history, and because the Board's novel claim of authority is belied by longstanding agency practice, we hold that

the Merger Procedures constitute a "gross violation" of Section 2, Ninth.[1]

Judicial review is available because the challenged action constitutes a "gross violation" of the Act. Having found such a violation, it is clear that appellants must prevail on the merits. Accordingly, we reverse the judgment of the District Court dismissing appellants' complaint; we remand case number 91-5223 for entry of declaratory and injunctive relief in appellants' favor; and we remand case number 91-5310 for reconsideration in light of the new judgment in case number 91-5223.

I. Background

Enacted in 1926, the RLA is a comprehensive statute governing labor relations in the railroad and airline industries. In 1934, Congress amended the Act to create the National Mediation Board, a three-member agency whose primary function is to mediate labor disputes among employees and carriers covered by the RLA. *See* 45 U.S.C. § 154 (1988). Section 2, Ninth of the Act also endows the Board with limited jurisdiction to investigate representation disputes among employees "upon request of either party to the dispute," and, following such investigation, to certify to the parties and to the carrier the identity of the designated bargaining representative. *Id.* at § 152 Ninth.

For more than fifty years following its creation, the Board unvaryingly conducted representation investigations only at the behest of employees or their representatives. In 1987, however, with no direction from Congress, the Board decided that existing procedures under Section 2,

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[1] The separate concurring opinion by Judge Randolph holds that judicial review also is available to the appellants under section 704 of the Administrative Procedure Act, *see* 5 U.S.C. § 704 (1988), and that the Merger Procedures cannot withstand review for lack of authority in the Board to promulgate them. We agree with this alternative basis for decision.

Ninth were "inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger." *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218, 241 (1987). The Board announced its intention to promulgate revised procedures with prospective application for handling representation disputes sparked by mergers, acquisitions and consolidations, and it set forth immediately effective interim procedures which permitted carriers to invoke the Board's jurisdiction in those cases. *See id.* at 241-42; *see also Missouri Pacific Railroad (Union Pacific)*, 15 N.M.B. 95, 111 (1988) (clarifying that *Trans World Airlines/Ozark Airlines* "interim procedures were meant to apply to the railroad industry as well as the airline industry"). Thereafter, the Board sought comment from carriers and labor organizations on a draft of the Merger Procedures, and, in November 1989, issued them in final form.

The Board purported to rest promulgation of the Merger Procedures on "established authority under Section 2, Ninth, of the Railway Labor Act." 17 N.M.B. at 44. The Board cited no specific language in the statute to support this assertion. Rather, recognizing that mergers [2] may lead to changes in craft or class designations and may result in multiple certifications for the same craft or class of employees, the NMB concluded that expanded investigatory procedures were appropriate in order to further the Board's purported mandate of certifying only unions which represent the "majority of a system-wide class of employees." *See id.* at 46. Accordingly, the Merger Procedures seek to require carriers to inform the NMB in writing of intent to merge, after which the Board will conduct an investigation to resolve "the status of the certifications on the merged carrier." *Id.* at 51.

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[2] The Merger Procedures define "merger" broadly to include any "consolidation, merger, purchase, lease, operating contract, acquisition of control or similar transactions." Merger Procedures, 17 N.M.B. at 50.

The Merger Procedures also contemplate that the Board *sua sponte* may investigate the status of post-merger certifications. Thus, for example, the Procedures state that it is "the affirmative responsibility of the Board" under the Act to determine the status of its prior certifications. *Id.* at 47; *see also id.* at 49 (asserting that the Board retains "flexibility to appropriately investigate and apply its procedures to different situations which may arise in the future"). Moreover, at no time in this litigation has the Board disavowed the appellants' claim that the Procedures seek to empower the Board to investigate a carrier's representation status on its own initiative.

Following the issuance of the Merger Procedures, the Railway Labor Executives' Association and eighteen other rail labor unions (collectively, "RLEA") filed this suit in the District Court. RLEA sought both a declaratory judgment that the Board lacked statutory authority to promulgate the Merger Procedures and a permanent injunction against their enforcement. The District Court, relying on *Switchmen's,* dismissed RLEA's complaint on the ground that the adoption of the Merger Procedures fell "within the unreviewable discretion of the NMB." *Railway Labor Executives' Ass'n v. NMB,* No. 89-3306, at 7 (D.D.C. June 10, 1991) (memorandum opinion).[3] A panel majority of this court reversed, concluding that Section 2, Ninth "does not bear the new construction the

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[3] RLEA also brought a second suit in the District Court, challenging the Board's application of the Merger Procedures. In that case, the Board, at the request of Burlington Northern Railroad Co. ("Burlington"), had investigated the effect of various mergers and consolidations, mostly dating back to the 1970s, on employee representation certifications. The Board investigated over eighty certifications, issuing some new ones and terminating others. *See In re Merger of Northern Pacific Ry.,* 18 N.M.B. 240 (1991). The District Court also dismissed this suit for want of authority to review the Board's actions. *See Railway Labor Executives' Ass'n v. NMB,* No. 91-1135 (D.D.C. Sept. 12, 1991) (order). The Burlington case was consolidated with this one on appeal before the panel as well as the *en banc* court.

Board has placed upon it." *Railway Labor Executives' Ass'n v. NMB*, 988 F.2d at 134. The panel majority held that judicial review was not foreclosed by *Switchmen's* or *Leedom v. Kyne*, 358 U.S. 184 (1958), because the Merger Procedures constituted a wrongful arrogation of power by the Board in "gross violation" of the RLA. 988 F.2d at 134. The full court thereafter granted the Board's suggestion for rehearing *en banc*.

On appeal, RLEA argues that the plain text and legislative history of Section 2, Ninth compel the conclusion that the Board may not investigate a representation dispute except upon request of the employees involved in the dispute. Because the Merger Procedures seek to authorize representation proceedings at the initiation of the Board or carriers, RLEA contends that the Procedures represent a gross violation of the RLA which may be reviewed by this court. In defense, the Board claims, first, that under *Switchmen's*, this court is powerless to review the Merger Procedures, and, second, that the Merger Procedures are a permissible interpretation of Section 2, Ninth to which this court owes deference. The Board's support for the latter argument consists largely of the contention that because Section 2, Ninth does not expressly *bar* the agency from investigating representation disputes in circumstances other than those enumerated, the Board is free to do so. As we explain, our reading of the text and legislative history of Section 2, Ninth accords with that of appellants, and we therefore reverse the judgment of the District Court.

II. Analysis

A. Reviewability of Board Actions Under Section 2, Ninth

1. The General Legal Framework

In *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930),

and *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), the Supreme Court established that if the absence of jurisdiction of the federal courts would result in a sacrifice or obliteration of a right that Congress created under the RLA, there would be a compelling inference that the general jurisdiction of the federal courts provides a basis for review. *See also Switchmen's*, 320 U.S. at 300. Thus, when a statutory command is "explicit and unequivocal," or when Congress has "codifi[ed] . . . rules governing . . . controversies" or stated "the various principles of agency which were to govern the solution of disputes" under Section 2, Ninth, the federal courts have jurisdiction to enforce the congressional command. *General Comm. of Adjustment*, 320 U.S. at 335.

The Supreme Court was concerned, however, that if general federal jurisdiction were left fully open, the federal courts might unduly interfere with the work of the Board in routine cases involving a mere "application of the principles of collective bargaining and majority rule." *Id.* at 334. Thus, in *Switchmen's*, the Court held that the Board's certification of representatives pursuant to Section 2, Ninth was a function committed exclusively to the NMB and was not judicially reviewable. The Board's role was to "find the fact [of representation] and then cease," and the Court found "plain" congressional intent that "the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Switchmen's*, 320 U.S. at 305.

Switchmen's has not been taken to mean, however, that all Board actions which fall within Section 2, Ninth's compass are immunized from judicial review. To the contrary, in accordance with the principles enunciated in *Leedom v. Kyne*, which relied in part on *Switchmen's*, federal courts have jurisdiction to review "action[s] taken in excess of delegated powers." *Leedom v. Kyne*, 358

U.S. at 190. In *Leedom v. Kyne,* the Supreme Court held that the district court had jurisdiction to set aside a certification of the National Labor Relations Board ("NLRB") where that agency had refused to poll professional employees before combining them in a bargaining unit with non-professional employees. Rejecting the NLRB's claim that the National Labor Relations Act ("NLRA") foreclosed review, the Court found jurisdiction to review because the NLRB had acted "in excess of its delegated powers and contrary to a specific prohibition in the [NLRA]." *Id.* at 188. Section 9(b)(1) of that statute, which provides that the NLRB "shall not" certify a bargaining unit comprising both professional and non-professional employees "unless a majority of such professional employees vote for inclusion" in the unit, *id.* at 185 (quoting NLRA), was "clear and mandatory," and its violation was subject to judicial review. *Id.* at 188. The Court said that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

Although *Leedom v. Kyne* itself dealt with a "shall not" statutory command, its application is not so narrowly limited. As we reasoned in *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch,* 322 F.2d 993, 997 (D.C. Cir. 1963) (McGowan, J.), an agency (in that case, the NLRB) could as well exceed its delegated powers by failing to adhere to a specific affirmative command. Thus, we were "unable to read the Court's decision in *Leedom v. Kyne* as limited to the negatively worded prohibition there involved." *See id.* The Supreme Court implicitly approved this reasoning in *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 661 (1965) ["Railway Clerks"], which held that NMB action was reviewable to the extent of insuring that the Board had complied with its affirmative statutory duty to investigate representation disputes. *See also Physicians*

Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 496 (D.C. Cir. 1980) (*en banc*) (agency must violate a specific command), *cert. denied*, 450 U.S. 917 (1981). Thus, it is of no moment that Section 2, Ninth does not state that "the Board shall not conduct an investigation except on the request of an employee," so long as we may conclude (as we do) that Section 2, Ninth imposes a clear and mandatory obligation upon the NMB to investigate representation disputes *only* at the behest of the affected employees. We reject any suggestion in our prior cases that it remains open to question whether *Leedom v. Kyne* applies only to negative commands.

In establishing a framework for review pursuant to *Switchmen's* and *Leedom v. Kyne*, recent decisions of the circuit have suggested that "[j]udicial review of NMB decisions is one of the narrowest known to the law," and have held that the "courts have no authority to review NMB certification decisions in the absence of . . . a gross violation of the Railway Labor Act." *International Ass'n of Machinists v. Trans World Airlines, Inc.*, 839 F.2d 809, 811 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 820 (1988); *see also Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (same effect). But these decisions have been premised, as was *Switchmen's*, on the assumption that the action of the Board fell within the compass of authority delimited by Section 2, Ninth. That is not the case here, for not only do the Merger Procedures constitute a "gross violation" of the Act, but the Board has no threshold jurisdiction to act at all in the absence of a request from the employees involved in a representation dispute.

Thus, our prior cases do not tell the whole story. The nonreviewability rule announced in *Switchmen's* always must be understood in light of the very circumscribed role the Board was thought to play under Section 2, Ninth. As the Supreme Court explained:

> The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. The function of the Board under § 2, Ninth is more *the function of a referee.* To this decision of the referee Congress has added a command enforcible by judicial decree. But the 'command' is that 'of the statute, not of the Board.'

Id. at 304 (citations omitted; emphasis added). The Court continued:

> Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command.

Id. at 305. These passages demonstrate that the Board has no freewheeling authority to act as it sees fit with respect to anything denoted a "representation dispute." The Board's authority is exclusive only with respect to the precise matters delimited by Section 2, Ninth. If employees have not sought an "investigation" under Section 2, Ninth, none can be initiated because the statute limits action to cases initiated by "employees."

Switchmen's itself—the very case on which the Board relies so heavily for its claim that we lack authority to review the Merger Procedures—thus makes abundantly clear that the Supreme Court crafted a very sweeping rule for a very limited class of cases: While the Board enjoys exceptional latitude when acting within its proper sphere of Section 2, Ninth power, that sphere itself is exceptionally narrow. Viewing *Switchmen's* in this light, it is difficult to conclude that the Supreme Court intended to insulate from review every action of the Board which arguably involves a question of representation, including those (like the one at bar) that bear absolutely no relationship to "find[ing] the fact" of who employees desire

as their representative.[4] *Switchmen's*, 320 U.S. at 305; *accord America West Airlines, Inc. v. NMB*, 986 F.2d 1252, 1256 (9th Cir. 1992) (as amended Feb. 26, 1993). In this case, the Merger Procedures present a question of the Board's very jurisdiction—a question that is analytically distinct from and *antecedent to* the issue of whether the Board has correctly found the "fact" of representation. And as the Supreme Court emphasized, "the administrative remedy is exclusive" only "[*i*]*f* the present dispute *falls within* § 2, Ninth." *General Comm. of Adjustment*, 320 U.S. at 336 (emphasis added).

2. The Special Case of Jurisdictional Questions

As we explain below, we have no doubt that the Merger Procedures constitute a bald and insupportable arrogation of power not conferred by the RLA; as such, the Procedures are reviewable under the traditional *Leedom v. Kyne* analysis. We pause here, however, to note another theory, urged by appellants, under which the Merger Procedures might be amenable to judicial review.

As we have observed in a prior decision, this circuit's law on the reviewability of NMB orders has developed along two tracks. *See International Longshoremen's Ass'n v. NMB*, 785 F.2d 1098, 1099-1100 (D.C. Cir. 1986) (summarizing development of dual lines of authority). The first track holds that Board certification orders ordinarily are unreviewable, unless they fall within the ambit of *Leedom v. Kyne*. The second track, which had its

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[4] The cases cited by the Board do not establish a contrary proposition. They merely confirm that the judiciary takes a back seat when the Board decides matters that are "necessary incident[s]" of its right and duty to find the fact of representation. *Railway Clerks*, 380 U.S. at 669 (form of the election ballot); *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 202 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968) (balloting policy).

genesis in two pre-*Leedom v. Kyne* decisions from the 1950s, holds that the court *may* review orders in which the Board concludes that it *lacks* jurisdiction to resolve a representation dispute. *See American Air Export & Import Co. v. O'Neill*, 221 F.2d 829 (D.C. Cir. 1954); *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) ["*ALDA*"].

Appellants urge us to abolish this distinction and to adopt a rule that *all* matters involving the Board's jurisdiction, not merely refusals of jurisdiction, are reviewable. They point out that those circuits which have squarely confronted the issue have held that threshold questions implicating the Board's jurisdiction to act under Section 2, Ninth fall outside *Switchmen's'* proscription against review. *See Delpro Co. v. Brotherhood Ry. Carmen*, 676 F.2d 960, 962 (3d Cir.) ("judicial review of NMB decisions concerning its own jurisdictional authority is not barred"), *cert. denied*, 459 U.S. 989 (1982); *International Longshoremen's Ass'n v. North Carolina Ports Auth.*, 463 F.2d 1, 3 (4th Cir.) (issue in *Switchmen's* "was not one of jurisdiction, but of the validity of a Board ruling on a substantial subject clearly within its authorized field"), *cert. denied*, 409 U.S. 982 (1972); *see also United States v. Feaster*, 410 F.2d 1354, 1361-62 (5th Cir.) (suggesting that judicial review of jurisdictional question might be available, but finding issue not ripe), *cert. denied*, 396 U.S. 962 (1969). Each of these cases involved the question whether a particular employer was a "carrier" within the meaning of the Act and thus subject to the Board's jurisdiction.

Although we need not resolve this issue conclusively in light of our holding that the Merger Procedures are reviewable under *Leedom v. Kyne*, on reexamination we find it difficult to support the distinction drawn in our prior cases between Board decisions asserting statutory jurisdiction and those declining to exercise it. Indeed, in endorsing a distinction, ALDA noted that in *Switch-*

men's and its two companion cases, "[t]he question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner." *ALDA*, 189 F.2d at 687-88. Under this interpretation of *Switchmen's*, appellants' challenge to the Merger Procedures, which is based not on the substance of any Board certification but on the issue of whether the Board has threshold authority, or jurisdiction, to act in the absence of a request from the employees involved in a representation dispute, could logically be reviewable as well.

Although *ALDA* apparently considered *Switchmen's* and its companions to have reserved only the question whether a refusal to exercise jurisdiction was reviewable, *see* 189 F.2d at 688, we do not think *Switchmen's* must be read so narrowly. An assertion of jurisdiction based on the erroneous belief that authority exists does not materially differ from a refusal to exercise jurisdiction based on the erroneous conclusion that statutory authority is lacking, and *Switchmen's* may not preclude review of either determination. On this point, the Fifth Circuit has noted that "it might be said that while *Switchmen's Union* holds that there is no judicial review where the Board has exercised its informed discretion" on a matter related to finding the fact of representation, *Switchmen's* "does not preclude judicial review of questions of law which bear directly upon the jurisdiction of the Mediation Board." *Feaster*, 410 F.2d at 1361.

We are cognizant that it may not always be a simple task to distinguish between Board actions which implicate the Board's threshold jurisdiction and those which are simply an erroneous exercise of functions legitimately entrusted to the Board's discretion under Section 2, Ninth (and, therefore, are reviewable only under the auspices of *Leedom v. Kyne*).[5] Inventive or mischievous litigants

[5] The dissent's argument that "jurisdictional questions" are entitled to deference is misplaced. In making this argument, the

no doubt would find ways to characterize as "jurisdictional" a broad range of Board actions, even those that no one reasonably would doubt to be within the compass of the Board's authority under Section 2, Ninth. Because we do not wish to extend such an invitation unnecessarily, we rest on our holding that this case is reviewable under the traditional *Leedom v. Kyne* analysis and leave for another day a fuller reconciliation of the jurisdiction-exercising versus jurisdiction-declining dichotomy set up in *ALDA*.

B. Analysis of Section 2, Ninth

The Board does not deny that the Merger Procedures seek to allow both the Board and carriers to initiate representation proceedings under Section 2, Ninth. Nor does the Board deny that in this respect the Merger Procedures are directly at odds with more than fifty years of unbroken practice under Section 2, Ninth. We need look no further than the language of Section 2, Ninth, the structure of the Act, and its legislative history to determine that these proposed procedures are not only unprecedented, but legally insupportable as well. In its defense of the Merger Procedures, the Board offers little more than the argument that we should defer to its construction of Section 2, Ninth. Yet, the Board cannot point to any statutory text or legislative history to support its position. And our analysis leads us to the firm con-

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dissent conflates reviewability under *Switchmen's* and deference under *Chevron*. Were we to decide that all questions involving the Board's exercise of jurisdiction under Section 2, Ninth were *reviewable*, that would not answer the question whether the exercise were proper; and, in some cases, we might well defer to the Board's construction of the RLA. In this case, the reason no deference is warranted is because we find no ambiguity in Section 2, Ninth. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (courts should defer to an agency's reasonable statutory construction only when Congress has left a gap for the agency to fill).

clusion that Congress left no ambiguity in Section 2, Ninth: the Board may investigate a representation dispute *only* upon request of the employees involved in the dispute. For the Board to act otherwise is for the Board blatantly to exceed its statutory authority.

1. The Plain Language

Section 2, Ninth of the RLA provides:

> If any *dispute* shall arise *among a carrier's employees* as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, *upon request of either party to the dispute,* to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and *certify the same to the carrier.* Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and

> have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 152 Ninth (emphasis added).

The above language makes perfectly clear that, as used in Section 2, Ninth, the term "parties" includes neither carriers nor the Board itself. Indeed, the Board does not claim otherwise. Because the requisite "dispute" must arise "among a carrier's employees," per the first clause of Section 2, Ninth, the succeeding phrase "upon request of the *parties to the dispute*" can refer only to those same employees. If Congress had considered carriers to be embraced within "parties to the dispute," the final clause of the first sentence would be entirely superfluous. There would be no need to command the Board to certify the results of the investigation "to *both* parties" and also to "certify the same to the carrier." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court's duty in construing statute is "to give effect, if possible, to every word Congress used"); *United States v. McGoff*, 831 F.2d 1071, 1080 (D.C. Cir. 1987) (same).

Furthermore, the entire structure of Section 2, Ninth makes it plain that representation investigations and elections are conducted only at the behest and for the specific protection of "employees." The "duty of the Mediation Board" to "investigate" does not arise except "upon request of either party," *i.e.*, "employees." The Mediation Board is only "authorized" to conduct an election in connection with "*such an investigation*" as is prescribed by Section 2, Ninth. When authorized to act, the Board is instructed to "insure the choice of representatives by the employees *without interference, influence, or coercion exercised by the carrier.*" An "election" can be conducted only "*for the purposes herein indicated,*" *i.e.*, to resolve a dispute "among a carrier's employees" "upon request of either party to the dispute." And the Board is even given

the power to gain access "to the books and records *of the carriers,*" but only to *"carry out the purposes and provisions"* of Section 2, Ninth.

In short, when read with care, it is apparent that, in enacting Section 2, Ninth, Congress was quite precise in defining what it meant by "[d]isputes as to [the] identity of representatives"—the title of Section 2, Ninth—and in codifying rules governing the resolution of such disputes. As the Supreme Court has made clear, such "command[s]" are "enforcible by judicial decree." *General Comm. of Adjustment,* 320 U.S. at 335.

Reference to other sections of the RLA confirms that Section 2, Ninth does not contemplate action-initiating roles either for the Board or for carriers. Thus, where Congress intended carriers and employees to be treated alike (that is, like "parties") with respect to the resolution of particular disputes, this is made plain in the statute. Section 2, Sixth, for example, provides that "[i]n case of a dispute between a carrier or carriers and its or their employees, arising out of grievances . . . it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees . . . to specify a time and place at which [a conference] shall be held. . . ." 45 U.S.C. § 152 Sixth (1988). Similarly, Section 2, Second provides that "[a]ll disputes between a carrier or carriers and its or their employees shall be considered . . . in conference between representatives designated" by the carrier and employees. 45 U.S.C. § 152 Second (1988). These sections go far to negate any argument that the term "parties" in Section 2, Ninth should be read to encompass anyone other than the employees mentioned in the first clause of that section.[6]

[6] We note that the Board itself relies on precisely the same sort of negative inference to argue that Congress "knew how to preclude authority that might otherwise be inferred." Brief for National Mediation Board at 39 n.24. The Board's argument leads nowhere, however, in light of the text of the statute, the legislative history, and the principle that agencies act only pursuant to delega-

It is also clear that where Congress meant to endow carriers with the right to invoke the Board's jurisdiction, or to authorize the Board to *offer* its services, it did so explicitly. Thus, Section 5, First provides that "[t]he parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases . . .," 45 U.S.C. § 155 First (1988), and proceeds to state clearly the circumstances under which the Board's mediation services may be had. Section 5, First also explicitly empowers the Board to assert its jurisdiction *sua sponte,* providing that "The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time." *Id.*

The fact that Congress omitted equivalent language in Section 2, Ninth cannot be deemed unintentional or immaterial. Thus, for instance, in *Landers v. National Railroad Passenger Corp.,* 485 U.S. 652 (1988), the Supreme Court said: "That Congress [in the RLA] *expressly provided* railroad employees with the right to the representative of their choice in Adjustment Board proceedings, *but did not do so* with regard to any earlier phase of the dispute resolution process, is *persuasive evidence*" that such a right does not exist at earlier phases. *Id.* at 656 (emphasis added). *See also id.* at 657 (finding "no merit" in contention that right to be represented by minority union "is implicit" in Section 2, Eleventh(c)); *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

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tions of power that are explicit or can *fairly* be implied. *See American Fin. Servs. Ass'n v. FTC,* 767 F.2d 957, 965 (D.C. Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986). The Board seems not to understand that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne,* 476 U.S. 926, 937 (1986).

(quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)). The inescapable conclusion from the plain language of Section 2, Ninth, therefore, is that Congress intended neither carriers nor the Board to initiate representation proceedings.

The crux of the Board's claim in this case is that as Section 2, Ninth does not *expressly forbid* the Board from asserting jurisdiction over a representation dispute in circumstances other than upon employee request, it should not be prohibited from doing so. But the language of Section 2, Ninth does not admit of this argument. The subordinate clause "upon request of the parties" expresses a limiting condition. Indeed, the entire first sentence of Section 2, Ninth imposes strict limitations on the Board's power. The sentence imposes four significant *conditions* that must be satisfied as a prelude to the Board's authority to investigate a representation dispute: there must be a dispute; the dispute must relate to representation; it must be among a carrier's employees; and one of the parties to the dispute must request the Board's services in resolving it. *See* 45 U.S.C. § 152 Ninth. Congress effectively has provided a "who, what, when, and how" laundry list governing the Board's authority. These limitations are utterly inconsistent with the notion that the Board blithely may decide that certain circumstances present such an inherent risk of a representation dispute that the Board may investigate at will.

Indeed, as established at oral argument, a finding that the Board may investigate representation disputes *sua sponte* would have far-reaching implications. Under such a regime, it would make no difference *who* brought an alleged dispute to the Board's attention—a rail passenger worried about service interruptions in the wake of a merger could write to the Board suggesting that it investigate, even where the merger in fact had created no representation issues (as might be the case if, for example, the same national union represented employees on both the

merged and acquiring carriers). Furthermore, the Board's power to meddle in railway labor relations would not be limited to the merger context. The Board could just as well announce, for example, that internal union elections and change of leadership automatically warrant Section 2, Ninth investigations because those events create a possibility of employee dissatisfaction with their certified representative. Yet, the notion that the Board enjoys this sort of power is plainly belied by the tightly confined role Congress assigned to the Board under Section 2, Ninth.

2. Legislative History

When Congress took up the RLA amendments in May 1934, it had before it two versions of what is now Section 2, Ninth from which to choose. The House considered H.R. 7650, a bill prepared by rail labor and introduced by Representative Crosser, alongside H.R. 9689, a similar bill prepared by federal Commissioner of Transportation Joseph B. Eastman and introduced by Representative Rayburn. *See Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce,* 73d Cong., 2d Sess. 1 (1934) [*"H.R. 7650 Hearings"*]. The version that Congress rejected specifically treated carriers as a "party" to representation disputes, and thus would have left no question as to the right of carriers to invoke the Board's jurisdiction. The rejected language provided:

> If any dispute shall arise between a carrier and a group of its employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the third paragraph of this section, it shall be the duty of the Board of Mediation, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, [the identity of the designated representatives].

H.R. 7650, 73d Cong., 2d Sess. (1934) (Section 2, Eighth), *reprinted in* 1 THE RAILWAY LABOR ACT OF

1926, A LEGISLATIVE HISTORY, at 775 (ABA 1988) [hereinafter 1 RAILWAY LABOR ACT].[7] Congress' refusal to enact language which would have established unequivocally the carriers' right to invoke the Board's jurisdiction is strong evidence that Congress did not intend the Board to have the power to confer that right on its own. *Cf. Landers*, 485 U.S. at 656 n.3 (in finding that a claimed right was not implicit in Section 2, Eleventh, Supreme Court relies on the fact that Congress declined to enact proposed amendment that expressly would have established such right).

Section 2, Ninth was no insignificant piece of the 1934 amendments. Rather, as the legislative history makes clear, Congress thought it critical to establish machinery by which employees *independently* could choose their bargaining representatives. *See* H.R. REP. No. 1944, 73d Cong., 2d Sess. 2 (1934), *reprinted in* 1 RAILWAY LABOR ACT, at 919; *see also* S. REP. No. 1065, 73d Cong., 2d Sess., pt. 1, at 2 (1934), *reprinted in* 1 RAILWAY LABOR ACT, at 821. For while the original legislation enacted in 1926 embodied the principle of free choice of employee representatives, it supplied no procedures to guarantee such choice. Experience had shown that railway management subverted their employees' rights by "disputing the authority of the freely chosen representatives" to represent the employees. *See* H.R. REP. No. 1944, at 2; *see also* SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 2-3 (1936) (principal defect of the 1926 Act was failure to provide means to insure employees' "right to select their representatives without influence or coercion from the management"). As the Board itself acknowledged in reflecting on pre-1934 history, "because

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[7] The House of Representatives ultimately passed H.R. 9861, a successor to H.R. 7650, which incorporated Section 2, Ninth as drafted by Commissioner Eastman and contained in H.R. 9689. Only H.R. 7650 contained a Section 2, Eighth that included carriers as parties to disputes.

employers have participated in" employee representation disputes, "bitter conflicts have often been precepitated." FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 4 (1935).

It would be incongruous to suppose, in light of this demonstrated problem and in light of the fact that H.R. 7650 was rejected, that the Board has some unarticulated, inherent authority to entertain Section 2, Ninth petitions from carriers. By invoking the Board's jurisdiction, a carrier could create a problem where employees saw none to exist or thrust itself into the center of a representation fray and thus attempt to influence the outcome of any subsequent election. For example, if the carrier petitioned for a Section 2, Ninth investigation very shortly after a challenging union began to court employee allegiance, that action could hasten an election and effectively prevent a serious challenge to the incumbent union. The timing of a carrier's invocation easily might signal management's sympathies and thus constitute forbidden "interference, influence, or coercion" over the employees' designation of their representatives. 45 U.S.C. § 152 Third (1988). Such a scheme does not comport with the structure of the Act or with Congress' clearly expressed intent.

A closely related concern animating the 1934 amendments was the problem of company unions. Although company-controlled unions were "clearly contrary to the purpose" of the 1926 Act, the practice continued because the Act did not include specific language which would, for example, bar carriers from paying the salaries of employee representatives. H.R. REP. No. 1944, at 2. The 1934 amendments emphatically were intended to prohibit company unions. *See* 78 CONG. REC. 11,713-14 (1934) (statement of sponsor Rep. Crosser); *id.* at 11,715 (statement of Rep. O'Connor). Thus, Section 2, Fourth spells out prohibitions on carrier conduct in some detail, providing, for example, that a carrier shall not "deny or in

any way question the right of its employees to join [or] organize . . . the labor organization of their choice. . . ." 45 U.S.C. § 152 Fourth (1988). Section 2, Third also expressly prohibits "interference, influence, or coercion by either party over the designation" or choice of representatives by the other. *Id.* at § 152 Third. The concerns expressed by members of Congress and addressed in Section 2, Third and Fourth point strongly toward the conclusion that carriers were to be screened out of any active role in the representation-selection process, in order to avoid any possible tainting of employees' free choice of representatives. *See also International Ass'n of Machinists v. Street,* 367 U.S. 740, 759 (1961) ("A primary purpose" of the 1934 amendments "was to strengthen the position of the labor organizations *vis-a-vis* the carriers").

The legislative history further suggests that the *sua sponte* investigation power claimed by the Board is antithetical to congressional intent. Because mediation was considered to be the Board's primary function, Congress sought to delineate the Board's other roles in a manner that would avoid compromising its effectiveness as a mediator. It was for that reason, for example, that both the House and the Senate amended the originally-proposed text of Section 2, Ninth so as to empower the Board to appoint a neutral committee to resolve sensitive representation-related issues. *See H.R. 7650 Hearings* at 71 ("to have mediation what it ought to be," Board "should have no power of decision save in the interpretation and administration of the law itself") (statement of Samuel E. Winslow, Chairman of Board of Mediation); *id.* at 40-41 (statement of Commissioner Eastman); S. REP. No. 1065, 73d Cong., 2d Sess., pt. 1, at 3 (1934), *reprinted in* 1 THE RAILWAY LABOR ACT, at 822; *accord Switchmen's,* 320 U.S. at 302-03 (noting importance of maintaining Board's neutrality). *Cf. Chicago & N.W. Ry. Co. v. United Transp. Union,* 402 U.S. 570, 580 (1971) (significant concern was expressed during passage of

1926 Act that Board be able to "maintain the confidence of both" labor and management). The Merger Procedures trench on this carefully crafted structural scheme by robbing employees of their prerogative to determine whether and when formal procedures are needed to determine their representation. It takes little imagination to comprehend how quickly the Board could lose the confidence and trust of employees and labor organizations it dragged into unwanted elections. Thus, the Merger Procedures could well undermine the mediation effectiveness that Congress thought critical.

Tellingly, the Board cannot point to a single piece of the legislative history (let alone the text of the statute) that even remotely suggests it enjoys the sort of power it has claimed for itself under the Merger Procedures. To the contrary, by all indications, Congress thought the Board's powers were not self-initiating, but were to be triggered by a proper invocation thereof by one of the employee parties to the dispute.[8] *See H.R. 7650 Hearings* at 71 (Board should be kept "clean and free from everything that has gone on up to the time a dispute is actually *brought to it*") (statement of Samuel E. Winslow) (emphasis added); *id.* at 79 (Board will investigate if representation "controversy *is carried to* the Board") (statement of George M. Harrison) (emphasis added). Our review of the legislative history thus confirms our reading of the statutory text, and satisfies us that the Merger Procedures represent an unsustainable arrogation of power not conferred by Congress, and a "gross viola-

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[8] We are neither troubled nor persuaded by the Board's insistence that our "literal" reading of Section 2, Ninth would preclude unions from invoking the Board's jurisdiction, as has long been the practice. It is clear that in applying for investigation of a representation dispute, unions act only on behalf of employees, not as "parties" in their own right. *See, e.g.*, 29 C.F.R. § 1203.2 (1993) (written applications for investigation of representation disputes "should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute").

tion" of Section 2, Ninth by any reading of *Leedom v. Kyne*.[9]

C. The Board's Consistent Interpretations and Practice

Although we find the language and legislative history dispositive, we briefly review the Board's longstanding interpretation of Section 2, Ninth. We find it telling that only in the last five years of its sixty-year history has the Board claimed that Section 2, Ninth affords it the authority to initiate representation disputes or to permit carriers to do so. The Board fails to point to anything in its pre-Merger Procedures history that so much as hints at the existence of such "latent" authority. As such, the Merger Procedures are much more than a midstream change in course; they are a wholesale attempt to rewrite the statute and history.

We note in passing that the mere fact that the Board never before has claimed the authority embodied in the Merger Procedures does not mean that such authority, if granted by Congress, has ceased to exist. *See United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950). However, our analysis of the statute and the legislative history convinces us that Congress did not confer the powers claimed under Section 2, Ninth, in which case, of course, it goes without saying that the bald assertion of power by the agency cannot legitimize it. *See id.*

From its inception, the Board has understood Section 2, Ninth to screen carriers *out* of the certification proceedings: "The 1934 amendments give authority to the National Mediation Board to determine the choice of employee representatives *without interference by management* . . . ." SECOND ANNUAL REPORT OF THE NATIONAL

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[9] In light of our conclusion that Section 2, Ninth permits only employees to invoke the Board's jurisdiction, we find it unnecessary to reach RLEA's additional contention that there is no "dispute" within the meaning of that section when the carrier or the Board initiates a Section 2, Ninth investigation.

MEDIATION BOARD 3 (1936) (emphasis added). *See also* FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 4 (1935) (Congress deliberately "eliminated [management], as a party, from any such controversy"). The Board, moreover, "has consistently interpreted the second and third general purpose of the act along with section 2, first and third, to exclude the carrier as a party to section 2, ninth, disputes," [10] THIRTY-EIGHTH ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 30 (1972), and it has reiterated that view even after promulgating the Merger Procedures. *See* FIFTY-FIFTH AND FIFTY-SIXTH ANNUAL REPORTS OF THE NATIONAL MEDIATION BOARD 33 (1989-1990) ("Carriers are not a party to representation elections . . .").

The Annual Reports and published Board decisions are equally telling for what they do *not* contain, namely, any suggestion that the Board itself has power to initiate a Section 2, Ninth investigation. Rather, the Board's long-standing practice makes it clear that, until recently, there never has been even the slightest confusion over the limited authority of the NMB. *See* Dana E. Eischen, *Representation Disputes and Their Resolution in the Railroad and Airline Industries, in* THE RAILWAY LABOR ACT AT FIFTY 29 (1977) (Board, "with rare exceptions, has viewed its own role [under Section 2, Ninth] as narrowly circumscribed"). Regulations that have been in effect since 1947 clearly contemplate that representation investigations will be initiated only by employees or their representatives. *See* 29 C.F.R. § 1203.2 (1993) (requiring applications for Board services to be in writing and accompanied by signed authorization cards from employ-

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[10] The second and third general purposes of the Act are "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; [and] (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter . . . ." 45 U.S.C. § 151a.

ees); *id.* at § 1202.3 (Board shall investigate upon request of the parties). There simply is no suggestion that the Board may investigate under any other circumstances. *See generally id.* at §§ 1202.3-1202.8 (1993) (containing no suggestion of power to investigate representation disputes absent request of parties). *Compare id.* at § 1202.1 (Board "may proffer its [mediation] services" at any time it finds a labor emergency).

Although we are not legally bound by the Board's past constructions of Section 2, Ninth, it is surely noteworthy that these constructions do not in any way endorse the current position of the Board. For more than fifty years, the Board conducted representation investigations *only* upon request of employees, and the evidence indicates that the Board never even assumed that it had the authority to act *sua sponte* or at the request of a carrier.

D. The Board's Claim of Implied Authority to Promulgate the Merger Procedures

As noted above, it is beyond cavil that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The Board errs grossly in suggesting that "the question . . . is whether the Act expressly precludes the Board from choosing" to adopt the Merger Procedures. Brief for National Mediation Board at 43. Quite to the contrary, the question is whether the Board's "exercise of quasi-legislative authority" is "rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

Unable to link its assertion of authority to any statutory provision, the Board's position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion. Agencies owe their

capacity to act to the delegation of authority, either express or implied, from the legislature. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"); *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985) ("The extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background.") (citation omitted, *cert. denied*, 475 U.S. 1011 (1986). The *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading. We cannot conclude, as the Board would have us do, that the fact that the Board is empowered to certify employee representatives in certain limited situations means the Board therefore enjoys such power in every instance in which a question of representation arguably exists. The language of Section 2, Ninth, the structure of the Act, and the legislative history all compel a contrary conclusion.

Nor is this a case in which principles of deference to an agency's interpretation come into play. Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied "delegation of authority to the agency." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). As we have already explained, "Congress has directly spoken to the precise question at issue" in this case, *id.* at 842, so there is no gap for the agency to fill. The text of Section 2, Ninth is plain; the legislative history and Supreme Court precedent underscore the limited role for carriers and for the Board under that section; and the Board can point to no contrary suggestion anywhere in its sixty-year history.

To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative

power (*i.e.* when the statute is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent. *See, e.g., Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) ("'[I]t is only legislative *intent to delegate* such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.'") (quoting *Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991)) (emphasis added). Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

III. Conclusion

The judgment of the District Court dismissing RLEA's complaint is hereby reversed. Case number 91-5223 is remanded for entry of declaratory and injunctive relief in favor of appellants; and case number 91-5310 is remanded for reconsideration in light of the new judgment in case number 91-5223.

So Ordered.

RANDOLPH, *Circuit Judge, concurring*, with whom MIKVA, *Chief Judge*, WALD, EDWARDS, and SENTELLE, *Circuit Judges*, join: Professor Henry M. Hart's celebrated "Dialogue" describes *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), as "too weakly reasoned to have much growing power." HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 409 (Paul M. Bator et al. eds., 3d ed. 1989). Yet grow it must, by leaps and bounds, to cover this very different case.

Years ago we held *Switchmen's* in one hand and *Leedom v. Kyne*, 358 U.S. 184 (1958), in the other, looked back and forth at the opinions and extrapolated the following: "peek at the merits" and if you see the National Mediation Board committing an "obvious" error in performing its certification duties, an error "gross" enough to constitute defiance of a statutory mandate, then and only then review the Board's action. *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). In my view, whether the original majority opinion in this case just peeked or whether, as Judge Williams thought in dissent, it threw the door wide open and looked the merits straight in the eye, is beside the point. To ask the questions is to assume, incorrectly, that *Switchmen's* applies to the case before us.

"Generalizations," Justice Douglas wrote for the Court, "as to when judicial review of administrative action may or may not be obtained are of course hazardous." *Switchmen's*, 320 U.S. at 301. That was 1943; the hazards are now long gone. Federal courts run little risk in generalizing, as they now often do, that judicial review of agency action is presumptively available. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962); *Armstrong v. Bush*, 924 F.2d 288, 291 (D.C. Cir. 1991). Enactment of the Administrative Procedure Act, and particularly 5 U.S.C. § 704, made it safe to say that judicial review "will not

be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.*, 387 U.S. at 140. This principle derived from the APA, and not *Switchmen's*, controls.

Not *Switchmen's* because the Supreme Court's decision and the Court's explanation for it do not speak to the type of Board action at issue here. In *Switchmen's*, one union sued to set aside the Board's order certifying, pursuant to § 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, a rival union as the authorized collective bargaining agent. The union argued that the Board had misconstrued its authority under the Act with respect to the appropriate bargaining unit. The Board issued its certificate in an adjudication as the APA defines it, that is, an "agency process for the formulation of an order." 5 U.S.C. § 551(7). An inter-union dispute of the sort involved in *Switchmen's*, the Court said, raised an "explosive problem," a problem Congress—through its silence—left to the Board alone to decide without any "dragging out of the controversy into other tribunals of law." 320 U.S. at 303, 305. To allow the dispute to fester while it worked its way through the courts would, in other words, tend to defeat the Act's purpose of "prevent[ing], if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148 (1969). As the Court wrote in the companion case to *Switchmen's*, "[h]owever wide the range of jurisdictional disputes [between unions] embraced within § 2, Ninth, Congress did not select the courts to resolve them." *General Comm. v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 336 (1943) (footnote omitted).

In case number 91-5223, however, we are not faced with a feud between rival unions.* The Board has not adjudicated such a jurisdictional dispute. It has not is-

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* I agree with the majority's decision to remand case number 91-5310 in light of our disposition of case number 91-5223.

sued a certificate pursuant to § 2, Ninth. There is no "explosive problem," no simmering controversy demanding swift and final settlement. We are asked to review the Board's issuance of the *Merger Procedures* described in the majority's opinion. These are plainly "rules" within the meaning of the APA—that is, "agency statement[s] of general . . . applicability and future effect designed to implement . . . policy" (5 U.S.C. § 551(4)). I would therefore follow the analysis in *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685, 687-89 (D.C. Cir. 1951). *Switchmen's* or not, the APA still controls. Under the APA, there is judicial review unless the statute, by its terms or as judicially interpreted, precludes it. 189 F.2d at 688, citing THE ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 136 (1947). *Switchmen's* interpreted the Railway Labor Act to bar judicial review of Board adjudications. But that interpretation and the reasons behind it do not reach the Board's rulemaking in this case. In light of the presumption in favor of judicial review and because there is no "clear and convincing evidence," *Abbott Labs.*, 387 U.S. at 141 (quoting *Rusk*, 369 U.S. at 379-80), that Congress intended to insulate Board rulemaking from judicial scrutiny, the APA gives petitioners the right to a decision on the merits and the APA obligates this court to give it. *Air Line Dispatchers Ass'n*, 189 F.2d at 689.

Why, the dissent nevertheless asks, should *Switchmen's* not be stretched to insulate Board rulemaking as well as Board adjudications of inter-union disputes? The APA gives the answer. After the APA, judicial review may be "preclude[d]" *only* "to the extent" a statute so provides. 5 U.S.C. § 701. No statute, certainly not § 2, Ninth of the Railway Labor Act, bars judicial review of Board rulemaking and no court, before or after enactment of the APA, has ever ruled otherwise. According to the Attorney General's Manual, the concept embodied in the APA's "to the extent" (or, as it then read, "so far as") clause is "a most important principle of construction"; it

is a principle intended to recognize that statutes do not always bar "judicial review altogether" and it is a principle the dissent completely disregards. Manual at 95; *see also* III KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.8, at 153-58 (1994). The Attorney General's Manual illustrates the point with a case in which a fired federal employee cannot challenge the agency's judgment to remove him from office, but can obtain judicial review of the question whether the agency followed the required procedures. *Id.* *Bowen v. Michigan Academy of Family Physicians*, 467 U.S. 667 (1986), supplies a more contemporary example. Although *United States v. Erika, Inc.*, 456 U.S. 201 (1982), held that under Part B of the Medicare program, computations of awards are not subject to judicial review, *Michigan Academy* held that regulations governing how the awards are computed are reviewable. *Switchmen's* is to *Erika* as this case is to *Michigan Academy*. Unlike most other agencies, the National Mediation Board's exercise of adjudicatory authority is generally immune from judicial scrutiny, but like other agencies its exercise of rulemaking power is not.

As to the merits, I fully agree with the majority's well-reasoned decision that the *Merger Procedures* are contrary to the Act.

WILLIAMS, *Circuit Judge*, dissenting: Congress provided in the Railway Labor Act that if a "dispute shall arise among a carrier's employees as to who are the representatives of such employees . . ., it shall be the *duty* of the Mediation Board, *upon request of either party to the dispute*, to investigate such dispute and to certify . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. . . ." Railway Labor Act, § 2 Ninth, 45 U.S.C. § 152 Ninth (emphasis added). From this explicit duty, the court infers not merely the absence of any *duty* to investigate representation disputes *sua sponte* (a clearly valid reading), but the absence of any Board *authority* ever to do so. Accordingly the court invalidates procedures that the Board established to address conflicting representational claims arising from mergers of carriers under the Board's jurisdiction. *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 NMB 44 (1989) (the "Merger Procedures").

With admirable candor, the court explicitly discards the model of highly deferential review laid down by the Supreme Court for Board decisions, see *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), and *Leedom v. Kyne*, 358 U.S. 184 (1958), and adopts the view that the Administrative Procedure Act overturns the *Switchmen's/Leedom* approach and substitutes conventional review of agency action—at least where the Board's action takes the form of a rulemaking. See Concurring Op. at 1-4; Maj. Op. at 5 n.1 (adopting view of concurring opinion). This distinction between rulemaking and adjudication evidently drives the outcome, for the court explicitly invalidates the Board's *rules*, Maj. Op. at 28, and merely remands its *adjudication* applying those rules, *id.*

In the alternative, the majority characterizes the issue —the propriety of the Board's exercising its investigatory and certification power without a request by an employee

or union—as jurisdictional, and suggests that this feature may render *Switchmen's/Leedom* completely inapplicable. Maj. Op. at 13-15.

Finally, the court purports to apply the *Switchmen's/Leedom* mode of analysis, and declares the Board's rule a "gross violation" of the Act, Maj. Op. at 24, though in fact giving the Board no more deference—and probably less—than is prescribed by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), for conventional review of agency decisions.

Neither of the court's two theories for displacing *Switchmen's/Leedom*—the APA or the characterization of the issue as jurisdictional—appears convincing. Considered with the exceptional deference that those cases require, the Merger Procedures easily pass muster. I dissent.

1. The APA

Any idea that the APA completely sweeps *Switchmen's* aside is quite inconsistent with the language of that decision and of the APA, with the history of the APA, and with post-APA decisions. The Supreme Court framed the *Switchmen's* decision as one of statutory interpretation, finding that Congress had precluded judicial review except in narrowly and expressly prescribed instances. "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U.S. at 302. Not surprisingly, we have found that the APA did nothing to change that result, noting that § 10 of the APA is expressly inapplicable where "statutes preclude judicial review", 5 U.S.C. § 701(a)(1). *American Air Export & Import Co. v. O'Neill*, 221 F.2d 829, 830 (D.C. Cir. 1954); but cf. *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685, 689 (D.C. Cir. 1951). The Attorney General's Manual on the Administrative Procedure Act (1947), the APA's primary legislative history, cites *Switchmen's* as a sample "interpretation of a statute [] intended to preclude judi-

cial review although the statute does not expressly so provide", *id.* at 94, thus locating NMB decisions—at least to the degree covered by *Switchmen's*—squarely in the category classified as unreviewable under the APA. And since enactment of the APA the Court itself has summarized *Switchmen's* in virtually the language of the APA exception, describing it as a case holding "that the Act precluded review of the Board's certification of a collective bargaining representative under § 2, Ninth." *Brotherhood of Railway & S.S. Clerks v. Association for the Benefit of Non-Contract Employees* (*"Railway Clerks"*), 380 U.S. 650, 658 (1965).

The concurring opinion (and the majority) would evidently distinguish between adjudicatory orders of certification and Board rules resolving certification issues. See Concurring Op. at 2-4. Certainly the APA invites no such distinction, providing generally for review of "agency action", 5 U.S.C. § 702, subject of course to the explicit exceptions of § 701. And while critics of *Switchmen's* have noted that the decision itself left open whether a court would affirmatively *enforce* a Board order without considering its legality, see Hart and Wechsler's The Federal Courts and the Federal System 409 (Paul M. Bator, et al. eds., 3d ed. 1988), I can see no basis for holding *Switchmen's* inapplicable to *rules.*[1] It is true, as Judge Randolph points out, that *Switchmen's* in part rested on an inferred congressional judgment against any

[1] I am assuming for the sake of argument that the challenge here concerns a "rule" and not a policy statement, which would not bind the agency. See, e.g., *Public Citizen, Inc. v. U.S. NRC*, 940 F.2d 679, 682 (D.C. Cir. 1991). While the Merger Procedures do oblige carriers to report mergers to the Board, they do not clearly bind the Board to investigate in any particular case. Merger Procedures, 17 NMB at 53-54 ("Carriers . . . may invoke the Board's services for a determination of the post-merger status of any NMB certifications"); *id.* at 51 ("The Board's investigation shall take the form required by the circumstances"). As the logic of excepting rules from *Switchmen's/Leedom* is unclear, it is anyone's guess whether the exception would embrace a policy statement, which is often reviewable only at the time of application.

"dragging out of the controversy into other tribunals of law", *id.* at 305, possibly arising out of congressional concern for quick dispatch of immediate representation controversies, but the Court's prime reliance was on the statutory structure. See *id.* at 305-06. And in *Railway Clerks* the Court spoke of Congress's allocation of power between the Board and the judiciary in terms completely divorced from any immediate exigencies: "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." 380 U.S. at 662.

Further, to the extent that the *Switchmen's* Court was influenced by perceptions of a congressional desire to resolve explosive problems quickly, that concern seems applicable here. The Merger Procedures attempt to deal efficiently with disputes before they escalate. Stonewalling by either side over rules of the game—sure to develop and be manifested as requests for stays of adjudications hinging on the outcome of judicial review of such rules—will undermine the dispatch evidently sought by Congress. Also, as pointed out by Airline Industrial Relations Conference and Regional Airline Association as amici:

> [I]nvalidation of the merger procedures would likely place a cloud over the status of the certifications, voluntary recognitions, and revocation of certifications resulting in [previously decided applications], and could result in unnecessary litigation and disrupt the stable post-merger collective bargaining relationships now in place.
>
> The destabilizing impact of the loss of the merger procedures would be even more significant in the future. . . .
>
> [Before the Merger Procedures, carrier decisions made without NMB clarification] frequently resulted in unresolved disputes, litigation and potential disruptions of airline operations.

Amicus Br. at 10-11.

Besides, the rule/adjudication distinction sets up perverse incentives for the Board, denying it the benefit of *Switchmen's* only when it gives widespread notice and opportunity to comment, and seeks to crystallize its views in a formal rule. After years of scholarly exhortations to agencies to make more use of rulemaking, because of that method's capacity to acquaint the agency with a wide range of viewpoints and to produce clear guidance for regulated parties,[2] it seems anomalous for this court to load the dice against NMB rulemaking. I see no basis for a rulemaking exception to *Switchmen's*.

2. Jurisdictional Issues

The court alternatively addresses, although ultimately declines to rely on, Railway Labor's argument that the interpretive issue before us is "jurisdictional" and therefore is outside the constraints of *Switchmen's/Leedom*. Maj. Op. at 13-15. In doing so it draws on a line of cases in our circuit granting review where the Board *declines* to exercise jurisdiction. See, e.g., *Air Line Dispatchers Ass'n*, 189 F.2d at 689. Finding the distinction between shortfalls and excesses of jurisdiction unsupportable, the court hints that it might extend the exception to any issue deemed jurisdictional.

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[2] Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L. J. 1463, 1482-83 (1992); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks*, 24 San Diego L. Rev. 9, 27-42 & n.80 (1987) (citing numerous articles treating the advantages of rulemaking); Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 Admin. L. Rev. 149, 163-64, 170 (1986); Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability; The Need for Procedural Innovation in Administrative Rulemaking*, 60 Cal. L. Rev. 1276, 1313-15 (1972); but cf. Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking* and Adjudication and Administrative Procedure Reform, 118 U. Pa. L. Rev. 485, 514-16 (1970). For similar arguments directed at state agencies, see Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 Admin. L. Rev. 121, 122-36 (1990).

I have no quarrel at all with the majority's rejection of the distinction between excesses and shortfalls of jurisdiction. But to review *de novo* any Board determination that the reviewing court classifies as jurisdictional is the wrong way out.[8] While courts commonly classify issues as relating to the "jurisdiction" of Article III courts, and make consequences turn on the classification, the categorization is typically self-evident because of language in the controlling documents, see, e.g., Art. III, § 2 ("The judicial power shall extend to. . . ."); 28 U.S.C. § 1331 ("The district courts shall have original *jurisdiction* of all civil actions arising under the Constitution, laws or treaties of the United States"); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have *jurisdiction* of appeals from all final decisions of the district courts. . . ."). While Congress elsewhere in the Railway Labor Act expressly framed its mandate in jurisdictional terms, see 45 U.S.C. § 155 First (entitled "Disputes within jurisdiction of Mediation Board"), the section here in dispute, § 2 Ninth, uses no such label, and the majority offers no interpretive principles for identifying provisions as jurisdictional. Indeed, the majority acknowledges the hazards in making such classifications. See Maj. Opp. at 15.

In the absence of a manageable line between jurisdictional and other issues, non-deference for "jurisdictional" issues is just a tag for the court's conclusion. "[T]here is no discernible line between an agency's exceeding its [jurisdictional] authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 381 (1988) (Scalia J., concurring). See also Louis L. Jaffe, Judicial Control of Administrative Action 356-57 (1965). Thus, while appellants' brief seeks to

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[8] The Board argues persuasively that in fact our prior reviews of non-exercises of jurisdiction can be justified as mere applications of *Leedom.*

distinguish between "cases concerning whether the NMB erroneously exercised its functions under Section 2 Ninth" and ones where "the issue is whether the NMB has the statutory authority to perform those functions at all", Opening Br. at 26, the purported dichotomy falsely assumes that an agency has "authority" to act erroneously in exercising its functions.

Presumably out of reluctance to use an undefinable category, the Supreme Court has not withheld *Chevron* deference in the face of claims that the issue was jurisdictional. See *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993) (applying *Chevron* to ICC's determination that statute did not grant it "initial jurisdiction . . . with respect to the award of reparations"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) (applying *Chevron* to scope of the Commission's jurisdiction over counterclaims); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984) (pre-*Chevron* decision expressly rejecting proposition that a different level of deference guides review of "a jurisdictional or legal question concerning the coverage of" the National Labor Relations Act). Nor have we. See *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 813 (D.C. Cir. 1993) (applying *Chevron* to issue whether provision of Interstate Commerce Act "is an independent source of authority" to modify collective bargaining agreements in a specific class of cases); *Texas Utilities Electric Co. v. Federal Communications Commission*, 997 F.2d 925 (D.C. Cir. 1993). In *Texas Utilities* we upheld the FCC's authority, under a statute granting it power over "attachment by a cable television system" to utility poles, to regulate attachments for cables carrying non-video services, expressly formulating the issue as whether such cables fell "within the FCC's regulatory jurisdiction." *Id.* at 936. That issue seems no different in character from the question presented in *Switchmen's* itself—whether the NMB had the authority to divide a "craft or class".

Indeed, *any* issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed. Thus, one could ask in *Switchmen's* whether the Board had authority to issue certifications dividing a "craft or class" into subsets based on the area in which specific members worked (which the Board had denied), cf. 320 U.S. at 309 (Reed, J., dissenting), or one could ask whether the Board misapplied its authority by declining to make such divisions. Similarly, the issue here can be characterized as whether the Board had jurisdiction to investigate labor disputes within the railroad industry in the absence of a request by one of the parties, or as whether it misapplied its undoubted jurisdiction to investigate labor disputes in the industry. Such pliable labels should not control the scope of review.

3. Application of *Switchmen's/Leedom*

It remains to apply the principles laid down in *Switchmen's* and qualified in *Leedom*. In *Switchmen's* the Court held the Board's certifications of labor representatives completely unreviewable—at least at the instance of a party seeking to set aside the certification (leaving open how courts should address efforts to invoke judicial equity powers to affirmatively enforce such a certificate, see 320 U.S. at 307). As we have already seen, the issue of the meaning of "craft or class" could have been characterized as jurisdictional, and the Court expressly viewed it as a purely legal question, saying that the statute gave the Board the authority to interpret the words of the statute except in those instances where Congress had specifically called for judicial review. *Id.* at 305-06. Largely from the presence of express provisions for judicial review, the Court concluded "if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect of the problem* [apart from those explicitly covered], it would have made its desire plain". *Id.* at 303 (emphasis added). The Court later summarized *Switchmen's* as involving "a

question of statutory construction" and as holding that "it was for the Board, not the Courts, finally to resolve such questions". *Railway Clerks,* 380 U.S. at 658-59.

The *Switchmen's* Court adopted this view in the face of a dissent starkly pointing out the hazards. Justice Reed observed that the Court had authorized the NMB to determine "the statutory limits of its own powers as well", *Switchmen's,* 320 U.S. at 321 (Reed, J., dissenting), and that such a deferential rule "risk[ed] administrative action beyond or contrary to the legislative will", *id.* at 312. Perhaps moved by such concerns, the Court in *Leedom v. Kyne,* 358 U.S. 184 (1958), created a narrow exception to prevent the Board from flouting a clear, nondiscretionary duty under the statute. At issue was an order of the National Labor Relations Board in certification proceedings under § 9 of the NLRA. The statute stated "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and [non-professional employees] unless a majority of such professional employees vote for inclusion in such unit". *Id.* at 185. The NLRB *conceded* that "in commingling professional with nonprofessional employees . . . it had acted it excess of its powers", *id.* at 187, and the Court found judicial relief available. Evidently not regarding even conceded legal error as a sufficient ground for judicial interference, the Court emphasized that the Board order was "contrary to a *specific* prohibition in the Act", *id.* at 188 (emphasis added) and was "an attempted exercise of power that had been *specifically withheld*", *id.* at 189. It stressed how patent a violation the Board had committed, describing the statutory provision at issue as "clear," "mandatory," and "definite". *Id.* at 188, 189.

In this circuit we have used a number of formulae to characterize the power of review established by *Leedom.* We have, for example, read it to permit review only in instances of "gross violation of the statute". *International*

Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks, 402 F.2d 196, 205 (D.C. Cir. 1968). And we have read the *Switchmen's/Leedom* combination as mandating a form of judicial review that is "one of the narrowest known to the law". *International Ass'n of Machinists v. TWA,* 839 F.2d 809, 811, amended in technical part, 848 F.2d 232 (D.C. Cir. 1988). A reviewing court may only "peek at the merits" and may interfere only if the peek reveals an error "as obvious on the face of the papers as the violation of specific statutory language". *International Bhd. of Teamsters,* 402 F.2d at 205. The insistence on specific statutory language accords with the Supreme Court's parallel statement in *Railway Clerks* that without a "specific requirement" in the Act itself, it is not sufficient to rely on "terms of policy and broad generalities as to what the Railway Labor Act should provide". 380 U.S. at 671.

Review under *Switchmen's/Leedom* would appear to be *at least* as deferential to the agency as if review under *Chevron* stopped after the application of so-called "prong one". In that phase of review, we determine "whether Congress has directly spoken to the precise question at issue", *Chevron,* 467 U.S. at 842, or has "unambiguously expressed" its intent, *id.* at 843. If it has done so, the congressional intent of course controls despite what the agency may think. If Congress has been ambiguous on the issue, however, we go on to consider whether the agency's interpretation is a "reasonable" one, and uphold any such reasonable view, *id.* at 844, even though there may be another reasonable interpretation that we would adopt if resolving it *de novo, id.* at 843 n.11.

Unless an agency decision would flunk the first prong of the *Chevron* test, i.e., violate the "unambiguously expressed" intent of Congress, I do not see how it can be invalid under the emphatically restrictive form of review permitted by *Leedom* as an exception to *Switchmen's.*

* * * *

A "peek at the merits" reveals no "clear" error in the Board's reading of the statute. The pertinent section is worded as follows:

> *If any dispute shall arise among a carrier's employees as to who are the representatives of such employees* designated and authorized in accordance with the requirements of this chapter, *it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties,* in writing, within thirty days after the receipt of the invocation of its services, *the name or names of the individuals or organizations that have been designated and authorized to represent the employees* involved in the dispute, and certify the same to the carrier.

Railway Labor Act, § 2 Ninth, 45 U.S.C. § 152 Ninth (emphasis added).

The Board's Merger Procedures provide that railroad carriers that have merged "may invoke the Board's services for a determination of the post-merger status of any NMB certifications on the applicable properties." See Merger Procedures, 17 NMB at 54. They also allow the Board to act on its own initiative. See *id.* at 50-51. Investigation and certification—sorting out which union represents which employees when the employees dispute such matter—are incontestably what § 2 Ninth authorizes the Board to do. "[S]o long as the Board is acting with the purpose of 'find[ing] the fact' as to who is the employees' representative, the courts are deprived of jurisdiction to review Board decisions." *America West Airlines v. NMB,* 986 F.2d 1252, 1256 (9th Cir. 1993).

While the appellants argue that the Board is undertaking to resolve matters that are *not* representation disputes between unions, the Merger Procedures suggest nothing of the sort. The Procedures assert a power to investigate only whether the merged carriers will operate or are operating "as a single transportation system",

Merger Procedures, 17 NMB at 51, which would necessitate a *single representative* for each "craft or class" within the system. See *Alia Royal Jordanian Airlines/IBT*, 10 NMB 389, 390 (1983); *Seaboard System Railroad-Clinchfield Line*, 11 NMB 217, 224 (1984) (citing the *First Annual Report of the National Mediation Board* (1935)). If two or more unions claim to represent the same craft or class, they would seem to be in dispute, both as the term is used in ordinary language and as it is used in § 2 Ninth. Nothing in the Procedures asserts an intention to proceed in the absence of such a dispute, i.e., unless more than one union claims to represent a single craft or class, or (conceivably) workers in a single craft or class identify more than one union as their representative. The Procedures call explicitly for comments by incumbent representatives, 17 NMB at 54, who will presumably reveal their harmony when it exists. In the adjudication before us, the Burlington Northern case, where unions made conflicting representational claims, the Board resolved them and then stopped. Findings Upon Investigation, 18 NMB 240, 260 (1991). Thus the Procedures themselves and the application before us manifest an intent merely to resolve union or employee disputes as to who represents which employees and to certify the results.

While § 2 Ninth imposes on the Board a specific *duty* to act under some circumstances (a request by a party), it says nothing "clear" or "explicit" or "specific" or "definite" about *capacity* to act when representation disputes within the railroad industry come to its attention by other means. The Board does not assert that carriers are "parties" entitled to "request" such investigation or certification; the Supreme Court in *Railway Clerks* previously upheld the Board's rejection of the carriers' claim of a statutory entitlement to participate as parties. 380 U.S. at 666-68. The Court held that the Act did not "*require* that [the carrier] be made a party to whatever procedure the Board uses to define the scope of the electorate", *id.*

at 666 (emphasis added), but went on to say that "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board", *id.* at 666-67. In the Merger Procedures the Board has sought to exercise that discretion.

The Court in *Leedom* stressed a principle behind the *Switchmen's* exception—the protection of specific rights granted in legislation. *Leedom,* 358 U.S. at 190-91. Here, the employees have shown no specific "right" on which the Merger Procedures might be thought to encroach. Indeed, insofar as stultification of the agency will preserve multiple representation of workers in a single craft in a single system (as indeed it will), it will preserve *violations* of the system-wide representation rule adopted by the Board under § 2 Fourth. See *Seaboard,* 11 NMB at 226-27. True, any employee has a right to request a Board investigation when a dispute among employees arises, and if the Board were to adopt procedures renouncing its duty to act upon these requests, reversal under *Leedom* review would appear appropriate. But nothing in the Merger Procedures strips employees of the specific right to invoke the Board; the Procedures merely grant the same right to others without impairing the employees' ability to request investigations.

Thus I agree in full with the majority's view that the reasoning of *Leedom* cannot be confined to "shall not" commands in the statute. Some agency *refusals to act* would violate a plain statutory duty or command, see *Miami Newspaper Printing Pressmen's U. Local 46 v. McCulloch,* 322 F.2d 993, 997 (D.C. Cir. 1963) (refusals to certify election results may be reversible under *Leedom*); cf. *Air Line Dispatchers Ass'n,* 189 F.2d at 689 (pre-*Leedom* case finding jurisdiction to review claim that Board inaction completely defeats statutory rights). But to apply *Leedom* to the present case disregards the admonition of *General Committee of Adjustment v. Missouri-Kansas-Texas R.R. Co.,* 320 U.S. 323

(1943), that "the command of the Act should be *explicit* and the purpose to afford a judicial remedy *plain* before an obligation enforcible in the courts should be implied". *Id.* at 337 (emphasis added).

Further, I can imagine a "clear" or "plain" statutory violation even in a case where the statute does not literally spell out the command or prohibition violated. Judge Leventhal's phrase in *International Bhd. of Teamsters*—an "error . . . *as obvious as* the violation of specific statutory language" was well chosen. Thus contextual elements—some powerful linguistic norm, an important substantive background assumption, legislative history of unusual clarity, or prior judicial interpretive authority—might be so convincing that the peek at the merits would disclose a violation. No such element is present here. The majority invokes two of these possibilities—the legislative history and a linguistic norm (the concept that the expression of one thing excludes alternatives not expressed). Neither suffices.

Before turning to legislative history and linguistic norms, I will briefly address the issue of past Board practice. It seems most improbable that this could ever seriously influence the outcome of review under *Switchmen's/Leedom*, since even the more intrusive review under *Chevron* recognizes that agencies may alter their interpretations of the statutes they are charged to enforce without forfeiting the deference they are otherwise due. *Chevron*, 467 U.S. at 863. Thus, even reading previous Board pronouncements as disclaimers of the authority asserted here, see Maj. Op. at 25-26, would not affect the case. Further, there is no possible way the past practice can be read as completely disclaiming statutory authority to investigate and certify *sua sponte*. The Board has an established practice of *sua sponte* investigation where it discovers election fraud, see, e.g., *International Bhd. of Teamsters*, 402 F.2d 196, and, as mergers necessarily change the "systems" to which the Board's principle of systemwide representation applies,

its action here vindicates a similar interest. There is simply no warrant for the majority's claim that such Board efforts to preserve the integrity of past certifications will undercut the neutrality necessary for its mediation functions under § 5 First. Cf. Maj. Op. at 23-24.

The legislative history does indeed show that Congress was concerned with company unions and with employer interference with the *choice of representation.* See Maj. Op. at 22-23. But it is not at all clear why Board disentanglement of the impact of mergers on systemwide representation on its own initiative will tend to subject employees to such interference or control. The majority has not explained how employer requests interfere with the independent choice of employees to choose a preferred representative, except to imply that the carriers have absolute control over the timing of their requests and might choose to time their requests to disrupt (for example) one union's challenge to an incumbent. Maj. Op. at 22. But the assumption of power over timing is invalid. The Procedures require the merging carrier to "notify the NMB in writing *at the same time it files with the Interstate Commerce Commission for approval of its intent to merge.*" 17 NMB at 50 (emphasis added). And while the Procedures do allow carriers to "invoke the Board's services" after the ICC filing is complete, 17 NMB at 53-54, this would only occur in cases where the Board has not acted in response to the carrier's initial filing.

The majority's reading of § 2 Ninth sacrifices important purposes that Congress sought to achieve. As the Court in *General Committee* pointed out "[section 2, Ninth] was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees", 320 U.S. at 336, and that "[h]owever wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them", *id.* The Board has

identified merger situations as among those commonly producing disputes falling within that range, and its use of carriers to identify these disputes in their early stages is not "clearly" outside the Board's expressly granted § 2 Ninth power to investigate and certify representatives in such instances.

Congress's rejection of the Eastman version of § 2 Ninth (designating carriers as parties to the dispute and legally *entitling* them to request Board investigation), see Maj. Op. at 20-21, proves nothing about the Board's *discretion* to allow carriers to request Board intervention in specified circumstances. As *Railway Clerks* made clear, congressional refusal to order party status for carriers left "solely in the discretion of the Board" "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions". 380 U.S. at 666-67. Had the Eastman bill passed, the Board would have been *required* to investigate at the behest of carriers and would have been investigating a different type of dispute—union-versus-carrier rather than union-versus-union. Congress's desire to prevent employer intrusion is not thwarted by the Board's adopting a policy of starting investigations when carriers bring to its attention specific circumstances that in its experience are likely to produce potentially disruptive representation disputes.

Finally, the majority reads too much into legislative silence when it implicitly relies on the proposition that congressional specification of one thing—a duty to investigate an employee request—negates the alternative. The first difficulty is that the majority slides over the question of just what alternative may be negated. While it is quite reasonable to read the provision for employee request as a "limiting condition" for the Board's *duty* to investigate, see Maj. Op. at 19-20, it is quite another to infer negation of Board *authority* to investigate in response to carrier notice of mergers. The Court adopted precisely that distinction in *Railway Clerks* in holding that the

Board was under no duty to allow carrier participation but was entitled to allow it and define its scope.

Legislative silence may, of course, reflect either a legislative decision to leave the issue unresolved or a failure to focus on the issue shaply. Where the issue arises in administration of a statute that Congress has confided to an agency, *Chevron* tells us how to read such a gap—as a matter to be resolved by the agency. See 467 U.S. at 843-44; *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). See also *Cheney R.R. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990), and cases cited therein. Not surprisingly, this court has at times deemed legislative silence an insufficiently clear indication of Congressional intent to warrant *Chevron* deference. *Health Insurance Ass'n of America v. Shalala*, Slip Op. at 19 (May 13, 1994); *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1104-06 (D.C. Cir. 1991). In some contexts, of course, a negative inference will make sense, as in the statute hypothesized in *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1291-92 (D.C. Cir. 1989), aff'd by an equally divided court, 493 U.S. 38 (1989): a ban on importation of apples, oranges and bananas clearly manifests an intent not to bar grapefruit. But nothing in the language or history of this staute makes the omission here the proper basis of such an inference.

Where the scope of judicial review is, as here, even more limited, use of such negative inferences is exceptionally unjustifiable. In *Switchmen's/Leedom* review in the past we have rejected such an approach. In *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir. 1989), we considered the Railway Labor Act's definition of "employee"—a "person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work," 45 U.S.C. § 151 Fifth—and refused to infer from its reference to *current* activity any actual requirement

of current work; rather we upheld the Board's decision that former strikers not presently working could vote. "[N]either section purports to speak exclusively." *Id.* at 460. We also refused to draw negative implications from the contrast in wording between the RLA and the NLRA. See *id.* at 461. In both this case and *PCCA* there is statutory language that states something affirmative; in *both* the issue is whether that affirmative implies a negative. Structurally, the issues are just the same. See also *International Bhd. of Teamsters,* 402 F.2d at 201-03 (recognizing Board's implied power to refuse to certify, or to decertify, representatives even though the statute authorized only identification and certification).

* * *

As the APA does not qualify the congressional preclusion of review of National Mediation Board decisions, and there is no principled way of singling out jurisdictional decisions for de novo review, I would apply the established principles of *Switchmen's/Leedom.* As I can find no "clear and mandatory" barrier to the Board's efforts to assure that existing certifications do not turn into violations of the systemwide representation rule, I would uphold its decision and affirm the district court's dismissal of the actions.

APPENDIX B

[Filed Jul 20, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1994

No. 91-5223 & 91-5310

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Appellants

v.

NATIONAL MEDIATION BOARD,
Appellee

Before: Mikva, *Chief Judge*, Wald, Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson and Randolph, *Circuit Judges*.

ORDER

It is ORDERED by the Court that the opinion of July 19, 1994 in the above entitled case is amended as follows:

On page 3, "Dissenting opinion filed by *Circuit Judge* Williams" should be amended to read:

Dissenting opinion filed by *Circuit Judge* Williams, with whom *Circuit Judges* Silberman, Ginsburg and Henderson join.

On page 1 of Judge Williams' dissent, the first line should be amended to read:

Williams, *Circuit Judge*, dissenting, in which Silberman, Ginsburg and Henderson, *Circuit Judges* join:

Per Curiam

For the Court

/s/ Ron Garvin
RON GARVIN
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 25, 1992 Decided March 9, 1993

Nos. 91-5223 and 91-5310

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Appellants

v.

NATIONAL MEDIATION BOARD, *et al.*

Appeal from the United States District Court
for the District of Columbia
(C.A. Nos. 89-03306 and 91-01135)

Before: EDWARDS, RUTH B. GINSBURG, and WILLIAMS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* RUTH B. GINSBURG.

Concurring opinion filed by *Circuit Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* WILLIAMS.

GINSBURG, RUTH B., *Circuit Judge*: In response to the increase in railroad mergers and consolidations in the 1980s, the National Mediation Board (NMB or Board) changed its approach to the certification—and decertification—of collective bargaining representatives for railroad employees. To assume a more active role, and to allow

employer involvement, the Board revised its interpretation of the governing Railway Labor Act (RLA or Act) prescription, Section 2, Ninth, 45 U.S.C. § 152 Ninth. In the two cases before us, unions representing railroad workers challenge the NMB's current reading of Section 2, Ninth as patently incorrect and an arrogation of authority Congress did not give to the Board. The district court dismissed both suits on the ground that the challenged Board actions are not reviewable in court.

We reverse the district court's decisions and remand the cases for the entry of declaratory judgments in favor of the unions. Section 2, Ninth, as Congress shaped the provision, does not bear the new construction the Board has placed upon it. Satisfied that the NMB has created action-initiating roles for employers and for itself without legislative license, we explain in this opinion why judicial review is available in this exceptional instance.

I. Background

In the 1930s, principally to prevent disputes between carriers and unions from disrupting transportation by rail, Congress amended the Railway Labor Act to create the National Mediation Board. Mediation of labor disputes in the railroad industry is the Board's main function. The RLA assigns to the Board, as an ancillary function, responsibility for the resolution of disputes concerning union representation for a rail carrier's employees. The dispositive provision of the Act, Section 2, Ninth, instructs that, "upon request of either party" to a dispute "among a carrier's employees" over the identify of their collective bargaining representative, the Board shall investigate and certify the result. Since the Board's creation in the 1930s and until the actions challenged here, the Board has conducted Section 2, Ninth certification (or representation) investigations in the railroad industry only at the request of the involved employees or organizations representing them.

In 1989, in response to an increase in railroad mergers and consolidations, the Board published new procedures delineating a more active approach to certification determinations. *See Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) (the *Merger Procedures*).[1] As explained in these *Merger Procedures*, "[i]t is the Board's longstanding practice . . . to certify only unions that represent the majority of a system-wide class of employees," that is, only unions that represent the majority of all persons doing the same job throughout an entire (integrated) company. *Id.* at 46 (construing Section 2, Fourth of the RLA). Mergers and consolidations, the Board recognized, combine once separate groups of employees into a single integrated workforce, and may therefore generate "question[s] as to who is the authorized or designated [employee] representative." *Id.*

The *Merger Procedures* were designed to facilitate the Board's prompt response to, and resolution of, merger-sparked representation qusetions. *See id.* at 47. Specifically, where the old procedures required the Board to wait until the employees became dissatisfied with the new situation and brought a dispute to the Board's attention, the *Merger Procedures* allow the Board to act at the request of a carrier or on the Board's own initiative.[2] As

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[1] Two years earlier, the Board similarly revised its procedures for the *airline* industry. *See* Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry, 14 N.M.B. 388 (1987). In International Bhd. of Teamsters v. NMB, 118 Lab. Cas. (CCH) ¶ 10,678 (D.D.C. 1990), the district court held that the Board's altered course for airline mergers was not subject to judicial review. That decision was not appealed. The district court in the instant case referred to, and expressed agreement with, the dismissal of the challenge to the new procedures for the airline industry.

[2] The *Merger Procedures* provide that carriers "may invoke the Board's services for a determination of the post-merger status of

explained by the NMB's counsel at oral argument, the Board sought an "orderly procedure" that would allow the NMB to "anticipate" and "prevent chaos," rather than "react" to it. The Board rested its authority to install invigorated procedures on Section 2, Ninth. *See id.* at 44, 48-49.

The Railway Labor Executives' Association and numerous national labor unions (collectively RLEA) challenged the Board's authority under Section 2, Ninth, to promulgate the *Merger Procedures.* The district court dismissed the suit for want of judicial authority to review the Board's action. *See Memorandum Opinion, Railway Labor Executives' Ass'n v. NMB,* No. 89-3306 (D.D.C. June 4, 1991); *Order, Railway Labor Executives' Ass'n v. NMB,* No. 89-3306 (D.D.C. July 2, 1991).

Burlington Northern Railroad Co. (Burlington) was involved in various mergers and consolidations between 1970 and 1985. Invoking the Board's new procedures, Burlington asked the Board to investigate the effect these mergers may have had on earlier employee representation certifications. The Board investigated over eighty certifications, extinguishing those involving defunct railroads

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any NMB certifications on the applicable properties." *See* Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry, 17 N.M.B. 44, 53-54 (1989) (the *Merger Procedures*). RLEA also asserts, without contest, that the Board has assumed authority to act on its own initiative. Under the new procedures, carriers must notify the Board when a merger is imminent, and include in the submission to the NMB "a complete copy of the carrier's merger application to the Interstate Commerce Commission." *Id.* at 50. "Carriers which have previously merged may [also] notify the NMB that the merger had occurred." *Id.* The Board, once informed of a merger, will investigate to determine whether the merging or merged carriers constitute "a single transportation system"; "[a]fter investigation, the Board will issue a decision concerning the status of the certifications on the merged carrier." *Id.* at 51. The Board's decision may effect the termination of "certification(s) on the acquired carrier." *Id.*

and issuing new ones on Burlington. *See In re Merger of Northern Pacific Ry.*, 18 N.M.B. 240 (1991). Maintaining that the NMB could investigate representation questions only upon request of employees or their representatives, RLEA sued both the Board and Burlington. Again, the district court dismissed the case on the ground that the Board's decision was unreviewable. *See Order, Railway Labor Executives' Ass'n v. NMB,* No. 91-1135 (D.D.C. Sept. 12, 1991). In both of these rulings, the district court relied on the line of cases headed by *Switchmen's Union v. NMB,* 320 U.S. 297, 305 (1943) (holding that Congress intended a Section 2, Ninth dispute between labor organizations, as to representation of a carrier's employees for collective bargaining purposes, "to reach its last terminal point when the administrative finding [is] made. There [is] to be no dragging out of the controversy into other tribunals of law.").

In this appeal, RLEA argues that the unambiguous text of Section 2, Ninth imposes two unyielding, essentially jurisdictional restraints: Board authority to investigate a certification exists *only* when a "party" calls a "dispute"[3] to the Board's attention; only the *employees* (or their representatives) involved in the dispute qualify as "parties." The Board[4] responds, first, that its Section 2, Ninth reading is immune from judicial review. Alternately, justifying its construction, the Board asserts that Section 2, Ninth describes when the NMB *must* investigate, but does not limit, and therefore leaves open for Board decision, when it *may* do so.[5]

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[3] RLEA also argues that the Board acted in the absence of a "dispute" meet for NMB resolution. To the extent that this argument tenders a discrete question, our disposition renders the issue moot.

[4] Although we refere in this opinion only to the Board, Burlington makes essentially the same arguments.

[5] At a few points, the Board seems to rest its authority to promulgate the *Merger Procedures* on an encompassing power it

II. DISPOSITION

A. *Reviewability*

In *Switchmen's Union v. NMB*, 320 U.S. 297 (1943), the Supreme Court held that the Board's certification of representatives for collective bargaining pursuant to Section 2, Ninth was not judicially reviewable. *Switchmen's Union* was a run of the road Section 2, Ninth case, a dispute resolved by the Board between two labor organizations over the representation of yardmen on lines operated by the New York Central system. The decision homed in on "the type of problem involved," and the Court cautioned that "[g]eneralizations as to when judicial review of administrative action may or may not be obtained are of course hazardous." *Switchmen's Union*, 320 U.S. at 301.

Courts have endeavored, after *Switchmen's Union*, to distinguish run of the road cases in which judicial review is not available from exceptional instances in which a court check is in order. It is settled that, when a dispute "arise[s] among a carrier's employees," 45 U.S.C. § 152 Ninth, then, "so long as the Board is acting with the purpose of 'find[ing] the fact' as to who is the employees' representative," court review is precluded. *See American West Airlines v. NMB*, 969 F.2d 777, 781 (9th Cir. 1992) (quoting *Switchmen's Union*, 320 U.S. at 305). "On the other hand, when the Board acts in excess of its statutory authority, judicial review may be available." *Id.* at 781. A stock formulation describes court oversight as confined to instances of the Board's "gross violation" of the RLA. *See International Ass'n of Machinists v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.) (quoting and affirming 654 F. Supp. 447, 450 (D.D.C.

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derives from the Act as a whole. Intelligently, however, the Board does not place heavy weight on this argument. *See* Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142, 158-59 (1969) ("[T]he Mediation Board has no . . . mandate to issue regulations construing the Act generally.").

1987)), *amended*, 848 F.2d 232, *cert. denied*, 488 U.S. 20 (1988).

In related administrative action settings, courts have used a variety of formulas to describe exceptional cases in which judicial review may be had despite a statutory regime generally precluding review. *See Leedom v. Kyne*, 358 U.S. 184, 188, 189 (1958) (National Labor Relations Board acted "in excess of its delegated powers and contrary to a specific prohibition in the Act"; Board "attempted exercise of power that had been specifically withheld"); *Dart v. United States*, 848 F.2d 217, 222 (D.C. Cir. 1988) ("*Leedom v. Kyne* test . . . has been alternatively phrased as whether the agency action 'on its face' violated a statute"); *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1311 (D.C. Cir. 1984) (review consistent with *Leedom v. Kyne* is limited "to instances where the error of the Board is patently an incorrect construction of the Act") (quoting II THE DEVELOPING LABOR LAW 1716 (C. Morris ed., 2d ed. 1983)); *United Food and Commercial Workers v. NLRB*, 694 F.2d 276, 278 (D.C. Cir. 1982) (review petitioner must show that Board "disregarded a specific and unambiguous statutory directive"); *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980) (en banc) ("an error of fact or law is insufficient); the Board must have acted without statutory *authority*") (emphasis added), *cert. denied sub nom. Physicians Nat'l House Staff Ass'n v. Murphy*, 450 U.S. 917 (1981).

For the reasons set out in the next section, we conclude that the Board's revised interpretation of Section 2, Ninth fits within the exceptional case category. In allowing carriers to trigger representation investigations, and undertaking to engage in such investigations on its own initiative, the NMB has "attempted [an] exercise of power [Congress] withheld." *See Leedom v. Kyne*, 358 U.S. at 189. In that attempt, the NMB "disregarded a specific and unambiguous statutory directive," *United Food & Commercial Workers*, 694 F.2d at 278, one that re-

serves to employees the opening call on certification investigations. *See Summit Airlines v. Teamsters Local Union No. 295*, 628 F.2d 787, 793-94 (2d Cir. 1980) (observing that Section 2, Ninth permits only employees or organizations representing them to invoke NMB's certification authority). The Board thus has "acted without statutory authority." *See Physicians Nat'l House Staff Ass'n*, 642 F.2d at 496. The NMB's recasting of Section 2, Ninth, moreover, may be viewed "as jurisdictional or nearly so." *See Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988).[6]

Before focusing sharply on Section 2, Ninth, we pause to note our disagreement with the Board's principal arguments on preclusion of review. In its brief, the NMB tendered a distinction that reduces to one between Board inaction, or refusal to act, and positive Board action. Board inaction, but not Board action, the NMB urged, could qualify for judicial review. *See* Brief for the Appellee NMB at 18 (*Switchmen's Union* doctrine precluding court review "has not been thought to encompass the circumstance in which the NMB violates the Act by failing to exercise a duty positively imposed by Section 2, Ninth").

At oral argument, the NMB placed heavier reliance on the position that review even of action, as opposed to inaction, would have been in order had the Board transgressed an explicit "shall not" command, i.e., a "specific prohibition" in the Act. Under this view, if we comprehend it correctly, judicial revew of the *Merger Procedures* would be proper if (and only if) Section 2, Ninth were *formulated* in these very words: "The Board shall not undertake a representation investigation unless its author-

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[6] We need not decide whether we should accord deference to an agency's construction of an ambiguous jurisdictional statute under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), *see* United Transp. Union v. U.S., No. 92-5002, slip op. at 11 n.4 (D.C. Cir. Mar. 9, 1993), because we rely here on the statute's plain meaning.

ity to do so has been invoked by employees or labor organizations representing them." The Board derives this position from the seminal *Leedom v. Kyne* decision (mentioned *supra* p. 7); there, the Supreme Court upheld district court authority to strike down a particular National Labor Relations Board (NLRB) bargaining unit certification determination, despite a statutory provision generally precluding judicial review of unit certifications. The NLRB certification in *Leedom v. Kyne* contravened a "specific prohibition in the [National Labor Relations] Act," 358 U.S. at 188, a "shall not" command. *See id.* at 185 (citing direction in 29 U.S.C. § 159(b)(1) that, ordinarily, NLRB "shall not" combine professional and non-professional employees in a single unit for collective bargaining purposes).

We do not read *Leedom v. Kyne* as dependent upon the "shall not" formulation. Rather, the Court resisted the assumption that Congress meant to negate judicial protection of rights jeopardized by an agency's "attempted exercise of power [Congress] withheld." 358 U.S. at 189; *see also id.* at 190 ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). *Leedom v. Kyne* is key, we agree. However, that decision supports RLEA in this controversy. The prescription at issue explicitly gives employees and their representatives alone the authority to initiate representation proceedings. If RLEA is right, as we hold it is, *see infra* pp. 11-14, that Congress withheld from employers and the Board itself a corresponding right of initiation, then the "judicial protection" accorded in *Leedom v. Kyne* is also in order here.

The Board's arguments distinguishing action from refusal to act, and express "shall not" commands from implicit ones, furthermore, are irreconcilable with this court's reasoning in *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988). The statute there at issue allowed the

Secretary of Commerce to "affirm, modify or vacate" administrative law judge (ALJ) decisions and declared the Secretary's orders "not subject to judicial review." *Id.* at 227 (quoting 50 U.S.C. App. § 2412(c)(1)). The Secretary, in the case presented in *Dart*, did not "affirm, modify or vacate"; instead, he reversed an ALJ decision. We held that the Secretary's *action* was amenable to judicial review. Exercising that review, we ruled that the Secretary lacked authority to reverse the ALJ's decision; the statute, we concluded, conveyed precisely that message, although it did not expressly say: "The Secretary may only affirm, modify or vacate, and shall not reverse, ALJ decisions." As *Dart* illustrates, a statutory proscription may be unspoken, yet entirely plain. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (a federal statute is not silent on its preemptive effect merely because it fails expressly to state the "truism that States may not pre-empt federal law").

In sum, *Switchmen's Union* instructs that courts may not review the NMB's resolution of a particular dispute among a carrier's employees concerning their representation. Courts may, however, check the NMB's action if the Board has arrogated authority Congress did not give it to revise Section 2, Ninth. The validity of the *Merger Procedures* presents an issue discrete from the facts of any particular case. The issue—who may trigger a Board investigation into employee representation—is essentially jurisdictional and needs to be resolved only once. "[C]ourts can review [issues] of this sort, while still preserving the finality that Congress sought in the vast majority of cases." *Dart*, 848 F.2d at 222.[7]

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[7] Our decision is fully consonant with United States Dep't of Justice v. FLRA, No. 91-1232 (D.C. Cir. Jan. 19, 1993), in which we held unreviewable a Federal Labor Relations Authority decision upholding an arbitrator's award. That case involved an allegation that the arbitrator had abused the large remedial discretion entrusted to him. The court explained that it confronted no "facial violation" or "patent misconstruction of the Statute." *See id.* at 9.

B. *The NMB's Role Under Section 2, Ninth*

The NMB's *Merger Procedures* craft a regime and role for the Board notably different from the design and function Congress delineated for the NMB. That conclusion seems to us unavoidable from the very text of Section 2, Ninth and other provisions of the RLA. The conclusion that the *Merger Procedures* impermissibly change Congress' scheme—a conclusion we derive from the text of Section 2, Ninth and from a comparison of that text with the text of other RLA prescriptions—accords with the legislative history of the Act, basic concerns underlying the legislation, and prior NMB and court decisions.

(i) *The Plain Meaning of Section 2, Ninth.* The RLA provision in controversy reads:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties . . . the name or names of the individuals or organizations that have been designated and au-

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Nor is our ruling in conflict with Professional Cabin Crew Ass'n v. NMB, 872 F.2d 456 (D.C. Cir. 1989) (*PCCA*). In that case, the NMB read the *statutory* term "employee," for voter eligibility purposes, to include former strikers. The constricted reading of "employee" urged by appellant in *PCCA*, we observed, had been rejected in the context at issue "[m]ore than a half century ago" as "narrow and too literal." *PCCA*, 872 F.2d at 461 (citing Nashville, C. & St. L. Ry. v. Railway Employees' Dep't of AFL, 93 F.2d 340, 342 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938)). The definition of voter-eligible employees challenged in *PCCA* could hardly be characterized as a "gross violation" of the RLA. Here, in contrast, not only is NMB's current interpretation of Section 2, Ninth without historic support, *see infra* pp. 14-15; most fundamentally, the Board can cite no statutory language, no term Congress used, upon which to pin its reconstruction.

> thorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. § 152 Ninth. The "parties," this provision prescribes, are "employees" not carriers. "[U]pon request of either party to the dispute" plainly refers back to "[i]f any dispute shall arise among a carrier's employees." Any arguable ambiguity over whether "parties" might include "carriers" (along with employees or their representatives)[8] is dispelled by Section 2, Ninth's final instruction: the Board is to cerify the outcome of its investigation *"to both parties* [to the dispute]," and then "certify the same *to the carrier."* 45 U.S.C. § 2 Ninth (emphasis added). Nor is there any ambiguity or gap to fill concerning the Board's charge: it is to investigate *"upon request of either party." Id.* (emphasis added).

Essentially, the NMB's construction adds to the *duty* Section 2, Ninth assigns to the Board—the obligation to investigate when employees so request—a further, entirely discretionary prescription moored to no statutory language: "The Board *may* undertake certification investigations at the request of a carrier or when the Board otherwise deems it appropriate." *But see Summit Airlines,* 628 F.2d at 793 ("the carrier does not have a 'side' in a dispute over representation and therefore cannot invoke the services of the Board under [Section 2, Ninth]"); *cf. Southeast Shipyard Ass'n v. United States,* No. 92-5014, slip op. at 8 (D.C. Cir. Nov. 24, 1992) ("To give the savings clause the meaning plaintiffs ascribe to it . . . would require many additional words to be read into the statute."). "Certainly there is nothing in the Act which can be interpreted as giving the Mediation Board the power to change the plain, literal meaning of the statute."

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[8] The NMB has allowed unions to apply for the services of the Board under Section 2, Ninth not as "parties" in their own right but, specifically, as authorized representatives of employees. *See* 29 C.F.R. § 1203.2 (1992) ("applications should be accompanied by signed authorization cards from the employees").

Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142, 159 (1969).

Confirming what the text of Section 2, Ninth conveys, other provisions of the Act show that, when Congress intended to refer to the Board or to carriers, it named them. Thus, for example, when a carrier is a party to a "dispute" covered by RLA prescriptions, the Act describes the dispute as one "between a carrier . . . and its . . . employees." Section 2, Second, 45 U.S.C. § 152 Second (calling for expedited consideration of "[a]ll disputes between a carrier or carriers and its or their employees"); Section 2, Sixth, 45 U.S.C. § 152 Sixth (concerning time and place of conference of representatives "[i]n case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements"). Section 2, Ninth, in contrast, speaks only of disputes "among a carrier's employees." 45 U.S.C. § 152 Ninth.

Similarly, when Congress meant to accord to the Board discretion to intervene on its own initiative, Congress so specified in the Act. *See, e.g.*, 45 U.S.C. § 155 First ("The Mediation Board *may* proffer its [mediation] services in case any labor emergency is found by it to exist at any time.") (emphasis added). Section 2, Ninth contains no analogous provision granting the NMB discretion to act on its own initiative. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Russello v. United States*, 464 U.S. 16, 23 (1983); *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992).

(ii) *Legislative History.* The legislative history further portrays Congress' understanding that the Board would investigate certification disputes only at the request of the involved employees. *See*, HOUSE COMM. ON INTERSTATE &

FOREIGN COMMERCE, TO AMEND THE RAILWAY LABOR ACT, H.R. REP. No. 2243, 74th Cong., 2d Sess. 4 (1936) (explaining that the National Mediation Board investigates "upon request of the employees involved"). We find instructive, in addition to comment on the text Congress passed, certain proposed statutory language Congress *rejected*. The rejected formulation would have accorded party status to carriers, qualifying them to request certification investigations:

> If any dispute shall arise between a *carrier* and a group of its employees as to who are the [proper] representatives of such employees . . ., it shall be the duty of the Board of Mediation, *upon request of either party to the dispute*, to investigate such dispute and to certify . . . .

H.R. 7650, 73d Cong., 2d Sess. (1934) (Section 2, Eighth) (emphasis added), *as reprinted in Railway Labor Act Amendments: Hearings Before the Comm. on Interstate & Foreign Commerce*, 73d Cong., 2d Sess. 3 (1934) (1934 Hearings). As the Board once recognized, in face of a proposal to include carriers as parties to certification disputes, Congress deliberately "eliminated [management], as a party, from any such controversy." FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 4 (1935); *see Summit Airlines*, 628 F.2d at 794 (noting Congress' "exclusion of carriers from representation proceedings" under Section 2, Ninth).

(iii) *Concerns Underlying the Act.* Two particular concerns Congress had at the time it composed the RLA bear on the Act's designation of employees, but not carriers or the Board itself, as initiators of Section 2, Ninth certifications. First, Congress wished to assure that employees would perceive the Board as a detached mediator, not an activator or detector, of their disputes. *See Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 580-81 & n.13 (1971) (suggesting that Congress carefully composed RLA's provisions to preserve employees'

confidence in the Board as a detached, impartial mediator); *see also* 9 THEODORE KHELL, LABOR LAW § 50.04 [1], at 50-10 (1992) ("It is important to understand . . . that as a matter of principle the NMB is neither adjudicatory nor prosecutorial. Its major function is . . . to assist in the mediation of disputes and to facilitate the settlement of disputes by the parties themselves.").

In addition to shoring up the image of the Board as a detached provider of dispute resolution services to employees, Congress wished to assure that employees and their unions would "be free from employer influence and control." HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, TO AMEND THE RAILWAY LABOR ACT OF MAY 20, 1926, H.R. REP. No. 1944, 73d Cong., 2d Sess. 2 (1934). This concern unquestionably encompassed employees' choice of bargaining representatives. *See, e.g., 1934 Hearings* 78-79. An initiating role for carriers might be seen as interfering with employees' autonomy to decide whether and when to reconsider their bargaining representative, just as a self-starting role for the Board might be viewed as compromising the NMB's status as disinterested referee.

(iv) *Prior Agency and Court Interpretations of Section 2, Ninth.* At oral argument, counsel for the Board described as "exactly correct" the court's statement that "[t]he Board has never had a history of *sua sponte* invoking, nor [has it] ever allowed carriers to invoke 2, Ninth." *Cf. NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 124 n.20 (1987) (reviewing court appropriately "consider[s] the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed"). Court decisions confirm that it is not within the duty of the Board to investigate a certification matter absent a request by employees or their representatives. *See, e.g., Brotherhood of Locomotive Firemen v. NMB,* 410 F.2d 1025, 1033 (D.C. Cir.), *cert. denied sub nom. Brotherhood of*

Locomotive Engineers v. NMB, 396 U.S. 878 (1969); *International Ass'n of Machinists v. Alitalia Airlines*, 600 F. Supp. 268, 275 & n.8 (S.D.N.Y. 1984), *aff'd*, 753 F.2d 3 (2d Cir. 1985) (per curiam). Precdent further indicates that the power of employees or organizations representing them "to invoke the [Section 2, Ninth] statutory process is exclusive." *Summit Airlines*, 628 F.2d at 794.[9]

CONCLUSION

Congress did not empower the NMB to vest in itself or in carriers authority to invoke the NMB's services under RLA Section 2, Ninth. We so conclude based on the unambiguous text of the Act, with which legislative history and precedent are harmonious. Only when a dispute exists among a carrier's employees as to their representative, and one or more disputants invokes the Board's certification jurisdiction, does the Board have authority to act.[10] Courts

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[9] The Board cites two cases for the proposition that it has discretion to undertake certification investigations upon carrier request: Brotherhood of Maintenance of Way Employees v. Grand Trunk W.R.R., 961 F.2d 1245, 1246, 1248-50 (6th Cir. 1992); Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906, 908 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). These decisions supply no authority for the NMB's position. While both cases arose in the aftermath of carrier-initiated Board action, neither addressed the propriety of that mode of initiation.

[10] However sensible the Board's view that stability in labor relations would be promoted by allowing carriers, and the NMB itself, to trigger Section 2, Ninth certification investigations, Congress has not so provided. Unless and until Congress acts, the Board must defer its investigation until affected employees or their representative invoke the NMB's certification authority. We note that Congress has tried out different arrangements in the past, see *generally* Charles M. Rehmus, *Evolution of Legislative Affecting Collective Bargaining in the Railroad and Airline Industries, in* THE RAILWAY LABOR ACT AT FIFTY 1, 4-16 (1977); FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 6-7 (1935), and may alter the scheme again. In the meantime, however, the NMB may not serve as surrogate legislator.

can determine a controversy of this essentially jurisdictional, one-time only character without trenching on the finality Congress ordered for certifications within Section 2, Ninth's compass. RLEA is therefore entitled to judicial declarations that the *Merger Procedures* and their application in the Burlington merger decision are incompatible with the certification regime established by the RLA.

For the reasons stated, the district court's judgments dismissing these actions are reversed and the cases are remanded for the entry of declaratory judgments for appellants consistent with this opinion.

It is so ordered.

EDWARDS, *Circuit Judge*, concurring: I fully concur in the majority opinion, and write separately only to state that I find perplexing the dissent's purported reliance on *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Taken to its logical extreme, the dissent's position turns *Chevron* on its head, into a doctrine without limits. But *Chevron is* limited: it applies only when an agency is exercising its *delegated* authority. *See Natural Resources Defense Council v. Reilly*, No. 92-1137, slip op. at 15 (D.C. Cir. Jan. 22, 1993) ("[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron.*") (Edwards, J., joined by R.B. Ginsburg and Williams, JJ.) (quoting *Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991)).

In this case, Congress established an explicit scheme for the initiation of representation proceedings before the National Mediation Board ("NMB"), and under that scheme, the NMB has absolutely no delegated authority to initiate a proceeding on its own or on the request of a carrier, or to promulgate rules to achieve these results. The NMB cannot now claim that authority in the name of convenience, any more than the National Labor Relations Board ("NLRB") can claim such authority under the National Labor Relations Act. *See* 29 U.S.C. § 159 (1988) (nowhere indicating that the NLRB has authority to pursue, on its own initiative, questions of employee representation). The absence of "thou shalt not" language is irrelevant, for both the Railway Labor Act and the National Labor Relations Act make it clear that only parties other than the NMB and NLRB are authorized to invoke representation proceedings.

Moreover, the mere existence of an agency does not give it the power to assert authority that Congress has not delegated. It is absurd to suggest that, under the second prong of *Chevron*, there is a statutory "gap to fill" or a

statutory "ambiguity" to cure whenever a statute fails to specify some authority than an agency seeks to invoke. This cannot be the meaning of *Chevron*, for it would allow federal agencies to claim limitless authority except in those few circumstances where Congress has expressly said "thou shalt not" exercise such authority. If we were to allow the NMB to assume the authority it has claimed for itself in this case, we would effectively invite it to assert *any* power over employee relations in the railroad and airline industries without regard to the statutory limitations prescribed by Congress. Such a decision would make no sense, and it surely would not comport with the mandate of *Chevron*. As the Supreme Court itself made clear in *Chevron:* "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n.9.

WILLIAMS, *Circuit Judge*, dissenting: Although the substantive issue presented by this case seems relatively unimportant, the court's decision dramatically broadens the scope of judicial review of National Mediation Board decisions. Despite extensive recitation of and homage to precedent establishing a highly deferential standard, Maj. Op. at 6-7, the court in practice uses an approach no more deferential (and perhaps even less so) than ordinary review under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). I dissent.

Judicial review under § 2 Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, started with a bang—*Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). Like this case, it involved a question of statutory construction—namely whether the Act permitted the Board to divide a "craft or class" of employees of a single carrier into smaller units for collective bargaining purposes. Plaintiff union attacked a Board decision that was based solely on the Board's notion that it had no such power, a view without visible support in the statutory language. The Court found the decision absolutely unreviewable, on the principle (as the Court later put it) "that it was for the Board, not the courts, finally to resolve such question." *Railway Clerks v. Employees Ass'n*, 380 U.S. 650, 659 (1965).

In *Leedom v. Kyne*, 358 U.S. 184 (1958) the Court somewhat tempered the nonreviewability rule of *Switchmen's*, but not much. At issue was an NLRB order in certification proceedings under § 9 of the NLRA, and the Court appeared to assume that the *Switchmen's* principles aplied. *Id.* at 187-90. The statute had explicitly barred inclusion of professional employees with nonprofessional ones without the former's consent. The NLRB *conceded* that it had done just that, *id.* at 187, and the Court found judicial relief available. Evidently not regarding conceded legal error as grounds enough to justify judicial interference, the Court emphasized that the Board order was

"contrary to a *specific* prohibition in the Act." *Id.* at 188 (emphasis added). It stressed how patent a violation the Board had committed, describing the statutory provision at issue as "clear," "mandatory," and "definite". *Id.* at 188, 189.

In applying the *Switchmen's/Leedom* mandate, this court has stated that the level of judicial review permitted by the decisions is "one of the narrowest known to the law." *International Ass'n of Machinists v. TWA,* 839 F.2d 809, 811 (D.C. Cir. 1988). Specifically, a reviewing court may only take a "peek at the merits" and may interfere only if the peek reveals an erorr "as obvious on the face of the papers as the violation of specific statutory language". *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Brotherhood of Ry., Airline & S.S. Clerks,* 402 F.2d 196, 205 (D.C. Cir. 1968).

Taking the prescribed peek, one finds no such blazing error. The Board's *Merger Procedures* provide that railroad carriers that have "merged" (as defined in the Board's regulations) "may invoke the Board's services for a determination of the post-merger status of any NMB certifications on the applicable properties." See *NMB Merger Procedures,* 17 N.M.B. 44, 54 (1989). The *Procedures* also allow the Board to act on its own initiative. See *id.* at 50-51. Investigation and certification—sorting out which union represents which employees—are indisputably what the Board is supposed to do. "[S]o long as the Board is acting with the purpose of 'find[ing] the fact' as to who is the employees' representative, the courts are deprived of jurisdiction to review Board decisions." *America West Airlines v. NMB,* 969 F.2d 777, 781 (9th Cir. 1992). The Board here does not propose to go off settling union/carrier disputes or engage in any other activity plainly outside the Board's mission.

Appellants' only claim is that the Board may not pursue its investigation and certification mandate at a car-

rier's instigation or on its own hook. But the statute says nothing to bar its doing so in either circumstance. The pertinent provision, § 2 Ninth, reads:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. § 152 Ninth.

The language *requires* the Board to engage in investigation and certification at the behest of a "party" to the dispute. The Board does not argue that carriers are parties entitled to "request" such investigation or certification; the Supreme Court rejected a carrier claim to a similar entitlement—participation—in *Railway Clerks,* 380 U.S. at 666-68. The Board's idea is simply that, as the statute does not preclude investigation and certification activities under other circumstances, it leaves the Board free to act in the circumstances that it has identified in the *Merger Procedures.* No statutory words suggest the contrary.

One might claim a conflict with the statutory language on the theory that if neither a union nor an employee brings the representation issue to the Board, there is no "dispute" to be resolved, so that the statutory predicate—a dispute—is absent. The theory is valid only in the most pedantic and meaningless sense. If investigation procedures are initiated at the behest of a carrier and it proves that the pertinent unions and employees are in harmony

as to who represents whom, clearly the proceeding must come to a prompt ending; the Board is not to go out into the world fomenting trouble. But plaintiffs here offer no suggestion that the Board has so acted, or even that the *Merger Procedures* would authorize such conduct.

Of course the Board could fall into "gross" or "clear" error even without the sort of direct flouting of the statute that was conceded in *Leedom*. Judge Leventhal's phrase in *International Bhd.*—an "error . . . as obvious as the violation of specific statutory language"—was well chosen. For example, some powerful linguistic norm might come into play, such as the proposition that when a legislature uses a string of words whose meanings all bear a strong family resemblance, plus a more general word with some meanings that stretch much farther, one reads the general word only in the limited sense common to the others. In Latin, *noscitur a sociis*. Plaintiffs here identify no such linguistic norm that the Board's decision might violate, and none comes to mind.

Alternatively, a strong substantive background norm might control. See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 469-508 (1989). The majority implicitly invokes this idea in its citation of *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), for the proposition that a statute need not express the "truism that States may not pre-empt federal law" to be read as embracing that principle. Maj. Op. at 10. I agree. Again, the difficulty is that no such substantive norm appears pertinent to this problem. At least neither the plaintiffs nor the majority has identified one.

Possibly one might find such a norm in the statute's legislative history. Plaintiffs and the majority have dredged that history and come up with very little. There is evidence of concern that unions should "be free from employer influence and control", Maj. Op. at 14, but it is not clear why Board sorting out of representation dis-

putes on its own initiative or employer impetus will tend to subject the unions to such control. There is similar evidence of legislative insistence on the Board's neutral status as between carriers and unions, see Maj. Op. at 14, but again there is no evident link to our problem; it is unclear why giving unions and employees the sole initiative is necessary to that neutrality or even conducive to it.

Finally, one might find a controlling background norm in prior judicial authority (though it, in turn, would presumably draw on some independent source such as those discussed above). The cases that the majority invokes, Maj. Op. at 15, are plainly inapposite. Court decisions denying any Board *obligation* to investigate absent a request by employees or their representatives simply do not cut one way or the other in the present case. In fact, the only authoritative judicial pronouncement on the subject points to the Board's freedom of maneuver on the subject: in the course of rejecting a carrier's claim that the statute *entitled* it to be a party to § 2 Ninth proceedings, the Court said firmly that the scope of the carrier's role (if any) was up to the Board. *Railway Clerks,* 380 U.S. at 666-68. "Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board." *Id.* at 666-67.

Because my peek at the merits reveals no obvious error, I would uphold the Board.

* * *

The majority's approach is radically different. At its core the decision rests primarily (though not by name) on the *expressio unius* canon: to express one thing is to exclude or to compel the opposite result for all alternatives not expressly stated. See Maj. Op. at 11-13. The majority reasons that if Congress mandated certification activity "upon request of either party" and did not explicitly grant the Board authority to investigate on its own

initiative or carrier request, then it must have forbidden investigation under those circumstances.

The use of this canon it troubling on many counts. First, the canon is implausible as a matter of linguistic practice. A statute's silence on a matter is typically as easily explained by the legislature's failure to address the point as by an inference that it intended a negative. "Come home right after school" is not a directive to dawdle after Little League.

Second, the canon is peculiarly inapposite in the context of judicial review of administrative agencies under *Chevron*. The canon is triggered by legislative silence, precisely the condition that under *Chevron* is understood to create a gap to be filled by the agency. See 467 U.S. at 843-44. See also *Cheney R.R. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990), and cases cited therein.

Where the scope of judicial review is, as here, even more limited, use of *expressio unius* is exceptionally unjustifiable. Not surprisingly, in *Switchmen's/Leedom* review in the past we have rejected such negative inferences. In *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir. 1989), we considered the Railway Labor Act's definition of "employee"—a "person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work," 45 U.S.C. § 151 Fifth—and refused to infer from its reference to *current* activity any actual requirement of current work; rather we upheld the Board's decision that former strikers not presently working could vote. "[N]either section purports to speak exclusively." *Id.* at 460. We also refused to draw negative implications from the contrast in wording between the RLA and the NLRA. See *id.* at 461. The majority dismisses *PCCA*, apparently on the theory that there the Board could "pin" its interpretation on statutory language. See Maj. Op. at 10 n.7. But in both this case and *PCCA* there is statutory language that states some-

thing affirmative; in *both* the issue is whether that affirmative implies a negative. Structurally, the issues are just the same.

Despite the recital of the many judicial expressions of exceptional deference, the majority's actual practice is no "peek at the merits". Instead, the court explores the "[c]oncerns underlying the [Railway Labor] Act," Maj. Op. at 14 and "proposed statutory language Congress *rejected*," *id.* at 13 (emphasis in original). Thus it moves beyond any patent error and is reduced to the sort of contentions that *Railway Clerks* forbid us to consider—"arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide". 380 U.S. at 671.

Indeed, the court's review appears less deferential even than garden-variety *Chevron* analysis. This is of course apparent in its strong reliance on *expressio unius*. In addition, while the Court in *Chevron* expressly discounted prior agency positions on the issue, see 467 U.S. at 862 (rejecting the proposition that an agency interpretation "is not entitled to deference because it represents a sharp break with prior interpretations"), here the majority treats a Board observation from 1935 as helpful in locking in today's Board. See Maj. Op. at 13-14.

Although the majority never explicitly repudiates the standards of *Switchmen's* and *Leedom*, it appears to rely on a view that the issue here is "essentially jurisdictional". Maj. Op. at 16. But the level of deference owed an agency's statutory interpretation—and *Switchmen's, Leedham*, and *Railway Clerks all* involved statutory interpretations —does not necessarily shift just because the issue may be characterized as jurisdictional. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) (addressing scope of the Commission's jurisdiction over counterclaims); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984) (assuming jurisdictional character of "concerted activities" provision of § 7 of the NLRA and declining to apply less deferential standard

to the NLRB's interpretation). If our non-deference here is to depend on any such characterization, we must both distinguish the Court's refusal to create such an exception in other contexts, and find some definition of "jurisdictional", a notoriously elusive word. See *Mississippi Power v. Miss. ex. rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) ("[T]here is no discernible line between an agency's exceeding its [jurisdictional] authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority."). See also Louis L. Jaffe, *Judicial Control of Administrative Action* 356-57 (1965). The majority, understandably, attempts neither task.

Equally unhelpful is the majority's suggestion that the issue has a "one-time only character". Maj. Op. at 16. This is so only in the sense that the issue is one of statutory interpretation—and is equally true of *all* statutory interpretations. Restricting courts to "one-time only" issues, in that sense, places off limits only review for factual correctness and for application of law to facts. In the past, the *Switchmen's/Leedom* line of cases has been understood to confine judicial intervention far more strictly.

I would uphold the Board.

APPENDIX D

[Filed Jun. 10, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-3306 (JHG)

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD,
Defendant.

MEMORANDUM OPINION

Plaintiffs Railway Labor Executives' Association ("RLEA") and its affiliated labor organizations ("plaintiffs" or "Rail labor") initiated this action against National Mediation Board ("NMB" or the "Board"), seeking a declaration that the rules and regulations adopted by the NMB on November 27, 1989 are null and void and permanent injunctive relief enjoining the NMB from utilizing or enforcing the procedures set forth in the 1989 regulations. Specifically, plaintiffs contend that the NMB has exceeded its statutory authority in issuing the regulations and has violated the provisions of the Administrative Procedure Act ("APA"), in particular 5 U.S.C. § 553, and the Fifth Amendment of the Constitution. Plaintiffs, NMB ,and intervenors Burlington Northern Railroad Company ("BN") and National Railway Labor Conference ("NRLC") have filed cross-motions for judgment on the pleadings and/or for summary judgment. For the follow-

ing reasons, defendants' motions are granted, and this case is dismissed.

I. BACKGROUND

According to the Complaint, on September 7, 1989, the Executive Director of the NMB transmitted to "Carriers and Labor Organizations in the Railroad Industry" a notice concerning "Merger Procedures in the Railroad Industry," to which was attached a draft of the proposed "Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry." The notice stated that the attached draft was submitted for written comments, not to exceed ten pages, and that the regulations were issued pursuant to "the Board's established authority under Section 2 Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. Section 152 Ninth." Section 2 Ninth provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Mediation Board, it shall be the duty of the National Mediation Board, *upon the request of either party to the dispute,* to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. § 152 Ninth (emphasis added). The regulations promulgated pursuant to 45 U.S.C. § 152 provide, *inter alia,* that railroad "carriers" which have "merged," as that term is defined in the regulations, "may invoke the Board's services for the determination of the post-merger status of any NMB certification on the applicable properties."

On September 28, 1989, Rail labor filed joint comments with the NMB concerning the rules and regulations proposed in the NMB notice of September 7, 1989. As an initial matter, plaintiffs objected to the NMB limitation on comments to ten pages. Plaintiffs also objected to the proposed regulations on the ground that the NMB had no statutory authority to adopt such regulations because the regulations provide for the creation, change, and termination of representation rights by the NMB without compliance with Section 2 Ninth. Specifically, plaintiffs contended that the RLA provides for the Board to investigate any dispute upon request of either party; that a carrier is not a party; and thus, that the NMB did not have general statutory authority to allow carriers to invoke the Board's services. On November 27, 1989, the NMB rejected the objections of plaintiffs and adopted the regulations with cosmetic changes.

I. DISCUSSION

In viewing a motion to dismiss or motion for judgment on the pleadings, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1506 (D.C. Cir. 1984); 5A C. Wright & A. Miller, *Federal Practice and Procedure,* § 1357, p. 304 (1990). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

Summary judgment, in contrast, is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a

need for trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

As a preliminary matter, the NMB contends that the complaint should be dismissed because none of the claims is ripe; at the time the motions were filed, no applications requesting an investigation pursuant to the new procedures had been received by the NMB. Although NMB's argument that plaintiffs' claims are premature may have some merit, even assuming *arguendo* that plaintiffs' claims are ripe, this Court is without jurisdition to decide this case.

Courts have acknowledged that jurisdiction to consider the legality of the Board's action is extraordinarily limited. Beginning with the decision in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 305 (1943), the Supreme Court has consistently held that Congress has committed the responsibility for protecting workers' representation rights exclusively to the Board and that "[t]here was to be no dragging out of the controversy into other tribunals of law." Accordingly, courts have authority to review Board decisions only upon a " 'showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee, or union.' " *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.),

cert. denied, 109 S. Ct. 62 (1988) (citations omitted). As the Court of Appeals for the District of Columbia Circuit recently recognized, "Judicial review of NMB decisions is extraordinarily limited. . . . Courts take only a 'peek at the merits' to determine if the NMB has committed an error of 'constitutional dimension or gross violation of the statute.' . . . The court is empowered to proceed no further unless the 'peek' reveals an error that is 'obvious on the face of the papers . . . without extension to "arguing in terms of policy or broad generalities as to what the Railway Labor Act should provide."'" *Professional Cabin Crew Ass'n v. National Mediation Board*, 872 F.2d 456, 459 (D.C. Cir. 1989) (citations omitted).

Plaintiffs contend that this case involves acts of the NMB that "patently" exceed the limited statutory jurisdiction provided to the Board by Section 2 Ninth because in issuing the regulations, the Board unilaterally expanded its investigative and certification authority when it authorized a carrier to initiate Section 2 Ninth proceedings where there was no "dispute . . . among [that] carrier's employees as to who are the representatives of such employees." Because of their contention that there has been a flagrant violation of the RLA, plaintiffs urge the Court to exercise jurisdiction over the cause. The Court cannot agree.

Although plaintiffs contend that "the Board has inserted words into Section 2 Ninth which Congress chose to omit from the statute," [1] thereby enlarging the NMB's discretion, it apears that plaintiffs, instead, would insert the word "only" in Section 2 Ninth. As plaintiffs argue, "Congress specifically authorized NMB to conduct elections to determine and certify employees' collective bar-

[1] Plaintiffs' Memorandum of Points and Authorities in Support of Cross-Motion for Judgment on the Pleadings or for Summary Judgment and in Opposition to Defendants' Motions to Dismiss, for Summary Judgment and for Judgment on the Pleadings ("Plaintiffs' Memo"), at 4.

gaining representatives *only* '[i]f any dispute shall arise among a carrier's employees as to who are the representatives of such employees.' " Plaintiffs' Memo, at 5 (emphasis in original).

The cited provisions, however, do not impose a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier's request. Although the Act clearly requires the Board to investigate "upon request of either party," it does not forbid the Board from investigating in other circumstances.[2] In fact, Section 2 First states unambiguously, "It shall be the duty of all carriers . . . and employees to exert every reasonable effort . . . to settle all disputes." As Judge Gesell concluded in a similar case, plaintiffs' "citation of these provisions creates a dispute 'in terms of policy and broad generalities as to what the Railway Labor Act should provide." ' *Railway Labor Executives' Ass'n v. National Mediation Board,* Civil Action No. 89-3306, slip op. at 5 (D.D.C. January 9, 1990). Absent a specific, clear statement that the Board shall not investigate *except* upon the request of an employee or representative, the Court lacks jurisdiction to imply such a requirement; this is precisely the kind of dispute that is within the unreviewable discretion of the NMB.[3]

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[2] The fact that a carrier has never been considered a "party" pursuant to Section 2 Ninth's provision that NMB may investigate a dispute "upon request of either party" does not affect the analysis. A carrier need not be considered a party to the dispute for this Court to find that a carrier is not explicitly excluded from participation under the RLA.

[3] Although plaintiffs appear to assert in their Complaint a violation, of the APA and of the Fifth Amendment of the Constitution, in their opposition to defendants' motions, they only argue that the "issue before this Court [involves] whether the NMB exceeded its statutory authority in providing railroads such unprecedented involvement in their employees' representation." Plaintiffs' Memo, at 3. In any event, having taken a "peek" at the merits, plaintiffs could not have maintained a cause of action

III. CONCLUSION

Accordingly, for the reasons expressed above, it is hereby

ORDERED that this case is dismissed.

IT IS SO ORDERED.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

June 4, 1991.

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based on either the APA or the due process clause. First, the APA does not confer jurisdiction to review agency actions where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Second, although the NMB imposed a page limitation, it also offered all interested parties an opportunity to be heard before issuing the regulations. Moreover, a carrier's request to the NMB would invoke an investigation, not an immediate decision.

APPENDIX E

[Filed Jul. 3, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-3306 (JHG)

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD,
Defendant.

ORDER

On June 10, 1991, the Court issued a Memorandum Opinion granting defendant National Mediation Board's ("NMB") motion for summary judgment and dismissing the complaint. On June 20, 1991, plaintiffs Railway Labor Executives' Association ("RLEA") and eighteen labor organizations filed a motion to alter judgment or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In addition, RLEA requested an extension until July 10, 1991, in order to file a supplemental memorandum to their motion. For the following reasons, plaintiffs' motions are denied.

As defendants point out, "[F]urther discussion in a supplemental memorandum would be equivalent to beating a dead horse." Memorandum of Points and Authorities by Intervenor-Defendant National Railway Labor Conference in Opposition to Plaintiff's Motions to Alter or Amend Judgment and for Leave to File Supplemental Memorandum in Support Thereof, at 5. Plaintiffs have filed a four-page memorandum and two-page motion that clearly set forth plaintiffs' position.

In addition, plaintiffs' motion to alter or amend judgment, in effect, seeks reconsideration of this Court's June 10, 1991 decision. However, plaintiffs fail to advance a single argument to persuade the Court that it erroneously concluded that the scope of this Court's jurisdiction to review the NMB's merger decision is limited. In reaching its decision, the Court considered a long line of authorities, including many decisions by the Supreme Court and our Court of Appeals, which decisions compelled the Court to conclude that this is precisely the kind of dispute that is within the unreviewable discretion of the NMB.

Plaintiffs' attempt now to draw upon legislative history is equally unpersuasive. The fact that Congress did not enact a bill specifically giving the NMB jurisdiction to investigate a dispute between a carrier and a group of its employees does not mean that a merged carrier cannot invoke the jurisdiction of the NMB to investigate disputes among its employees to determine who shall be certified (if anyone) to represent a merged craft or class of employees.

Accordingly, for the reasons expressed above, it is hereby

ORDERED that plaintiffs' motion for leave to file a supplemental memorandum in support of motion to alter or amend judgment is denied; it is

FURTHER ORDERED that plaintiffs' motion to alter or amend judgment is denied.

IT IS SO ORDERED.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

July 3, 1991.

APPENDIX F

[LOGO]

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

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17 NMB No. 13

File No. C-6230

PROCEDURES FOR HANDLING REPRESENTATION ISSUES, RESULTING FROM MERGERS, ACQUISITIONS OF CONSOLIDATIONS IN THE RAILROAD INDUSTRY

PROCEDURES

November 27, 1989

PREAMBLE

In *Trans World Airlines/Ozark Airlines,* 14 NMB 218 (1987) the Board established "interim procedures" for handling representation issues resulting from airline mergers, acquisitions or consolidations. The Board, in *Missouri Pacific Railroad (Union Pacific),* 15 NMB 95 (1988), applied these "interim procedures" to the railroad industry. In that decision, the Board also announced its intention to revise its merger procedures for the railroad industry.

These procedures are issued pursuant to *Missouri Pacific, supra,* and the Board's established authority under Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 152, Ninth.[1]

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[1] Pursuant to *Missouri Pacific, supra,* the Board distributed a draft of its procedures to railroad and union officials for comment. The Board received twenty-four timely responses. These comments were carefully considered by the Board.

The Board will utilize its traditional investigatory procedures to determine the facts relevant to the many variations of railroad mergers and acquisitions. The Board will ensure that such mergers and acquisitions are not in derogation of employee rights under Section 2, of the Railway Labor Act.

The NMB is vested with the final decisionmaking authority over representation issues. The merging or acquiring carriers are responsible for keeping the NMB fully informed. The carriers' actions decide and shape the nature and scope of the change in corporate structure and organization. The carriers also determine the timing involved. The Board's efforts will be advanced by prompt and complete submission of information concerning relevant developments and the reasons involved.

The merger procedures are issued pursuant to the Board's established authority under 45 U.S.C. § 152, Ninth, to investigate and determine who shall represent employees in the event of a dispute. In most cases, the initiating carriers contemplate the creation of a single transportation system. This decision, when communicated to the Board in advance of a merger date, will invoke the Board's rules on single carrier status which may affect representation rights. Further, in operational mergers, these procedures affirmatively provide that carriers involved can invoke the Board's services for a determination of the post-merger status of any NMB certifications. This investigatory approach is consistent with the NMB's merger policies as further expressed, *inter alia,* in *Trans World Airlines/ Ozark, supra,* and *Missouri Pacific Railroad (Union Pacific), supra.*

Mergers often lead to significant changes in carriers' size, nature, management, work force and labor relations. In particular, changes relate to the size, composition and functions of the employee work force. These changes affect the craft or class designations. In recognition of this, the Board has expanded the labor organizations' abil-

ity to raise questions of representation in instances involving mergers and acquisitions. *See, for example, Northwest Airlines,* 13 NMB 399 (1986); *Midway Airlines, Inc.,* 14 NMB 447 (1987); *Trans World Airlines/Ozark,* 14 NMB 218 and 14 NMB 343 (1987); *British Airways/British Caledonian Airways,* 16 NMB 17 (1988); *American Airlines, Inc.,* 16 NMB 99 (1988); and *National Railroad Passenger Corporation (Amtrak),* 13 NMB 412 (1986). Consistent with that expansion and the reasons for it, the Board may permit carriers to invoke the Board's merger procedures.

In certain cases, a merger may have already occurred. The Board recognizes that there may be continuing representation questions despite the fact that the merger may have already occurred. When there has been a major change in the actual operations of a railroad system, craft or class changes also occur. A question as to who is the authorized or designated representative is also likely to arise. The Board cannot ignore these changes under Sec-2, Ninth, of the Act where certain criteria are met.

It is the Board's longstanding practice in keeping with its statutory mandate to certify only unions that represent the majority of a system-wide class of employees. *Seaboard System Railroad-Clinchfield Line,* 11 NMB 217 (1984); *Missouri Pacific, supra; CSX Transportation,* 15 NMB 129 (1988); *Central of Georgia Railroad (Norfolk Southern Corp. Subsidiaries),* 16 NMB 5 (1988); *Ogden Union Railway and Depot Company,* 16 NMB 398 (1989); *USAir/Piedmont Aviation,* 16 NMB 412 (1989); *Federal Express/Flying Tigers,* 16 NMB 433 (1989); *British Airways/British Caledonian Airways,* 16 NMB 17 (1988); *American/AirCal,* 14 NMB 379 (1987); *Delta/Western,* 14 NMB 291 (1987); *TWA/Ozark, supra; Northwest,* 13 NMB 399 (1986); *Republic/Hughes Airwest,* 8 NMB (1980); and *Summit Airlines Inc. v. Local 295,* 628 F.2d 787 (2d Cir. 1980). Furthermore, the necessary system-wide nature of Railway Labor Act crafts or classes is well-established in the railway industry.

In *Summit*, the United States Court of Appeals for the Second Circuit found a representation dispute to exist in circumstances where there were doubts about system-wide representation and without the filing of a form NMB-3, "Application for Investigation of Representation Dispute." The court recognized that: "the NMB deems the dispute requirement of Section 2, Ninth satisfied . . . if some employees are indifferent or hostile to being represented. . . ." 628 F.2d at 793, note 3. Accordingly, the Second Circuit concluded: "[b]ecause it is apparent that [the organization] does not represent the majority of a craft or class of Summit's employees . . . the requirement of a dispute is met, and its resolution is for the National Mediation Board." *Id.*

The United States Court of Appeals for the Fifth Circuit reached a conclusion consistent with *Summit* in *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); "[a] representation dispute may occur even if only one union claims to represent the employees if there is a question whether a majority of the craft or class desires the union's representation." Significantly, *Texas International* was decided by the Fifth Circuit in the context of an operational merger between two carriers where no representation application had been filed.

Mergers that contemplate separate carrier status do not involve these rules but also may affect representation rights. Mergers may contemplate separate carriers but, in fact, be a single carrier. In that case, these rules apply. Accordingly, the NMB will require information on a continuing basis related to such operations to determine whether the separate status continues in fact and/or whether representation rights of employees have been affected.

Any creation, change, termination or extension of representation rights pursuant to NMB certification action is solely within the province and is the affirmative responsibility of the Board under the Railway Labor Act. The

Board intends to carry out its responsibilities through these procedures to resolve representation disputes which arise from mergers.

The case law is now established beyond reasonable contradiction that the National Mediation Board has plenary authority with respect to the impact of corporate mergers, acquisitions and consolidations on NMB representation certifications. For example, the U.S. Court of Appeals for the Second Circuit in *Air Line Pilots Association v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 22 (2d Cir. 1981), concluded that "the NMB is empowered to, and has shown itself able, to decide representation disputes arising out of corporate restructurings. . . . As the district court found, the NMB 'has shown itself alert to prevent carriers from frustrating representation rights by artful corporate devices.'" Further, in *Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040 (D.C. Cir. July 18, 1989), slip op. 13, the U.S. Court of Appeals for the District of Columbia Circuit recently concluded:

> All of the courts of appeals to have considered the issue . . . have held that the question whether a union's certification survives [a] . . . merger is a matter within the exclusive jurisdiction of the NMB. *See, International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir. 1976); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981); *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Brotherhood of Ry. Clerks v. United Airlines, Inc.*, 325 F.2d 576, 579-80 (6th Cir. 1963); *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986).

It is equally well established that with respect to those matters subject to the Board's comprehensive authority, the determination of the particular investigative approach

to be utilized is wholly within the NMB's discretion. As the Supreme Court found in *Railway Clerks v. Non-Contract Employees,* 380 U.S. 656, 662 (1965), "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ. . . ." The only limitation on the Board's authority with respect to such investigations are actions "made in excess of its delegated powers and contrary to a *specific prohibition* in the Act." *Id.* 380 U.S. at 659-660 (Emphasis in original).

Given the applicable "specific prohibition" standard, it is evident that the Railway Labor Act may not be construed so as to limit the Board's investigative discretion with respect to the participation of carriers in NMB investigations generally. Correspondingly, neither may the statute be construed to limit the NMB's discretion with respect to the particular extent or nature of the carriers' role in the NMB's merger investigations. Accordingly, in view of the lack of any such "specific prohibition" in the Act, those questioning the Board's authority to afford selective "standing" or other status to carriers in NMB merger investigations are limited to "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." *Railway Clerks,* 380 U.S. at 671. However, "it was to avoid the haggling and delays of litigation that such [policy] questions were left to the Board." *Id. See also, International Brotherhood of Teamsters v. Railway Clerks,* 402 F.2d 196, 205 (D.C. Cir.), *cert. denied,* 393 U.S. 848 (1968). These procedures reflect the Board's exercise of its plenary discretion over just such policy matters. The Board anticipates the full cooperation of the carriers and organizations involved.

While these procedures will be applied verbatim in most situations, there may be instances in which special applications are necessary. In fulfilling its responsibilities under Section 2, Ninth, of the Railway Labor Act, the Board must retain such flexibility to appropriately investigate and

apply its procedures to different situations which may arise in the future.

SUBPART A—GENERAL PROVISIONS

1) *DEFINITIONS*

a) The term "merger" as used herein shall mean a consolidation, merger, purchase, lease, operating contract, acquisition of control or similar transactions.

b) The term "carrier" means a carrier as defined in the Railway Labor Act, 45 U.S.C. § 151.

c) The term "organization" means a labor organization and representative as provided by Section 1, Sixth, 45 U.S.C. § 151, Sixth, and Section 2, Ninth, 45 U.S.C. § 152, Ninth of the Act.

2) *APPLICABILITY OF THESE PROCEDURES*

These procedures, effective upon the date of issuance, shall apply to all organizations and carriers which may be affected by a merger that has occurred or may occur in the future.

SUBPART B—SINGLE TRANSPORTATION SYSTEM

1) *FILINGS WITH NMB*

a) The carrier will notify the NMB in writing at the same time it files with the Interstate Commerce Commission for approval of its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Interstate Commerce Commission.

b) Carriers which have previously merged may notify the NMB that the merger had occurred. The submission to the Board shall include a statement of the date the merger occurred and the carriers involved in the merger.

2) *MERGER INVESTIGATION*

The NMB's investigation shall take the form required by the circumstances such as: interrogatories; document requests; on-site investigations; or hearings. The Board's merger investigation will determine whether the carriers will operate or is presently operating as a single transportation system. Applicable decisions regarding such investigations include but are not limited to *Seaboard System Railroad-Clinchfield Line*, 11 NMB 217 (1984); *Missouri Pacific, supra; CSX Transportation*, 15 NMB 129 (1988); *Central of Georgia Railroad (Norfolk Southern Corp. Subsidiaries)*, 16 NMB 5 (1988); *Ogden Union Railway and Depot Company*, 16 NMB 398 (1989); *USAir/Piedmont Aviation*, 16 NMB 412 (1989); *Federal Express/Flying Tigers*, 16 NMB 433 (1989); *British Airways/British Caledonian Airways*, 16 NMB 17 (1988); *American/AirCal*, 14 NMB 379 (1987); *Delta/Western*, 14 NMB 291 (1987); *TWA/Ozark, supra; Northwest*, 13 NMB 399 (1986); and *Republic/Hughes Airwest*, 8 NMB 49 (1980).

3) *MERGER DECISION*

a) After investigation, the Board will issue a decision concerning the status of the certifications on the merged carrier. Findings concerning the craft or class lines at the merged carrier may also be appropriate.

b) Where the Board finds that the certification(s) on the acquired carrier should terminate, such termination(s) will be effective on or after the date of the Board decision.

4) *REPRESENTATION APPLICATIONS FROM INCUMBENT LABOR ORGANIZATIONS*

a) Incumbent organizations on the affected carriers will be allowed, absent unusual or extraordinary circumstances, sixty days from the above-

described decision to file a representation application supported by a showing of interest of no less than 35% of the combined craft or class.

b) Evidence of showing of interest from incumbent organizations on the affected carriers may be comprised of, wholly or in part, authorization cards, dues check-off authorizations or seniority lists with a carrier involved in the merger.

c) All other representation applications will be subject to the standard showing of interest requirements contained in the Board's Regulations at 29 CFR §§ 1206.2 and 1206.5.

d) Failure to meet the above described 35% showing of interest requirement by an incumbent organization will result in dismissal. Such dismissal or withdrawal of an application will not act to impose the one year election bar contained in the Board's Regulations at 29 CFR § 1206.4.

5) *ELECTIONS*

Elections authorized pursuant to Subpart B will be given priority and progressed expeditiously through the balloting process and the final representation decision. In addition to elections under Subpart B(4), the Board may authorize elections based on the special circumstances of the particular case before the Board, including, *inter alia*, comparability of craft or class size.

6) *SUBSEQUENT REPORTING TO NMB*

The Board may require carriers and organizations to inform it in writing of post-merger developments.

SUBPART C—SEPARATE TRANSPORTATION SYSTEMS

1) *FILINGS WITH NMB*

The carrier will notify the NMB in writing at the same time it files with the Interstate Commerce Commission for approval of its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Interstate Commerce Commission.

2) *NMB INQUIRY*

The Board's inquiry will request from the carriers and organizations appropriate information concerning the separate transportation system.

3) *CONTINUING DUTY TO REPORT*

The Board may require carriers and organizations to inform it in writing of subsequent developments.

SUBPART D—MERGER OF OPERATIONS AT A LATER DATE

1) *FILINGS WITH NMB*

Carriers maintaining separate transportation systems, which subsequently seek to complete a merger of operations, shall notify the NMB at the earliest practicable date prior to the operational merger.

2) *APPLICABILITY OF SUBPART B*

Such cases shall be handled pursuant to the procedures established herein dealing with single carrier status at Subpart B, paragraphs 1-6.

SUBPART E—SUPPLEMENTARY MATTERS

1) *CARRIER INVOCATIONS*

Consistent with *Missouri Pacific, supra,* at 15 NMB 110-111, carriers which have satisfied the filing requirements of Subpart B(1) may invoke the Board's services for a determination of the post-merger status of any NMB certifications on the applicable properties.

2) *COMMENTS FROM INCUMBENT ORGANIZATIONS*

Incumbent organizations on the affected carriers may make relevant comments to the NMB in writing concerning the carriers' submission and any other pertinent matters.

3) *DISTRIBUTION OF INFORMATION*

Carriers and organizations must provide other participants with copies of each submission to the NMB by verified certificate of simultaneous service signed by counsel.

4) *PUBLIC INFORMATION*

The information submitted to the Board by carriers and organizations will be public information subject to the provisions of the Freedom of Information Act.

5) *ADMINISTRATIVE FILE NUMBERS*

a) Representation applications filed by incumbent organizations pursuant to Subpart B, paragraph 4, will be assigned a file number in the MR-series.

b) Carrier invocations of the Board's services pursuant to Subpart E, paragraph 1, will be assigned a file number in the MT-series.

c) All other submissions under these procedures will be assigned a file number in the M-series.

SUBPART F—EFFECT OF PROCEDURES

1) *NO EFFECT OF PROCEDURES ON VOLUNTARY RECOGNITION AGREEMENTS, COLLECTIVE BARGAINING AGREEMENTS OR PROGRESSION OF GRIEVANCES*

a) These procedures are not a bar to the effectuation of voluntary recognitions otherwise permissible under the Act. *See, TWA/Ozark,* 14 NMB 218 at 234 (1987); *Republic Airlines,* 6 NMB 817 (1979); *Braniff/Florida Express,* 15 NMB 294 (1988); *USAir/Piedmont, supra*; and *Federal Express/Flying Tiger, supra.*

b) These procedures shall have no effect on the survival of existing collective bargaining agreements.

c) These procedures shall not act to inhibit the processing of pending grievances otherwise permissible under the Act. *See, Delta/Western,* 14 NMB 291 at 302 (1987).

2) *NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT*

Existing rights under the Railway Labor Act shall not be enhanced or diminished by these procedures. For example, the Board recognizes that when a dispute involves the interpretation or application of a railroad collective bargaining agreement, Section 3 of the Railway Labor Act, 45 U.S.C. § 153, provides that it be referred to an appropriate adjustment board for resolution through arbitration. It is further understood that nothing in these procedures may be construed to require any particular internal collective bargaining structure on the part of any representative under the Act.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Charles R. Barnes
CHARLES R. BARNES
Executive Director

cc: All unions and
carriers in the
railroad industry.

APPENDIX G

[Filed Sep. 12, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1135 (JHG)

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD,
Defendant.

ORDER

On May 16, 1991, plaintiffs Railway Labor Executives' Association ("RLEA") and its affiliated labor organizations ("plaintiffs" or "Rail labor") initiated this action against the National Mediation Board ("NMB" or the "Board"),[1] seeking a declaration that the NMB exceeded its statutory authority under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, when it issued its April 23, 1991 decision, *Burlington Northern Railroad Company*, 18 NMB 240 (1991), in which the Board asserted jurisdiction over all crafts or classes on the BN, and no labor organization or employee "showing the requisite interest"[2] had requested its services or asserted that a representational dispute existed. The instant action was filed under Local Rule 405(a)(3) as a related case to *Railway Labor Executives' Association v. National*

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[1] On July 10, 1991, the Court granted Burlington Northern Railroad Company's ("BN") unopposed motion for leave to intervene as a defendant.

[2] Complaint, at 12.

Mediation Board, Civil Action No. 89-3306, which action was dismissed on June 10, 1991.

Plaintiffs, NMB, and BN have now filed cross-motions for judgment on the pleadings and/or for summary judgment. The parties agree, however, that "[t]he issues presented by this case are identical to those decided by this Court on June 10, 1991 in *Railway Labor Executives' Association, et al. v. National Mediation Board*, Civil Action No. 89-3306 (JHG) (D.D.C.). Because no new issues are presented by the pending litigation, the parties have agreed to the Stipulated Recorded [sic] filed in conjunction with this motion[,] and the parties have agreed to dispense with the necessity of filing memoranda in support of motions as well as with the necessity of filing oppositions or replies." [3] Motion of Defendant National Mediation Board to Dismiss or, in the Alternative, for

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[3] Plaintiffs have also filed a motion to strike attachments to the motion for judgment on the pleadings or, in the alternative, for summary judgment filed by BN. Plaintiffs contend that "the Stipulated Record is an agreement among the parties as to what constitutes the record in this proceeding and is an integral element in the parties agreement to dispense with the necessity of filing memoranda, oppositions, and replies." Plaintiffs' Motion and Memorandun [sic] in Support of Motion to Strike Attachments to the Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment Filed by Burlington Northern Railroad Company ("Plaintiff's Motion to Strike"), at 2. BN argues, however, that petitions for clarification of NMB's decision "are clearly part of the Stipulated Record even though they were not attached." Burlington Northern Railroad Company's Response to the Railway Labor Executives' Association, *et al.*'s Motion to Strike Attachments to Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment Filed by Burlington Northern Railroad Company ("BN's Opp. to Motion to Strike"), at 1.

BN's argument is unavailing. The parties entered into an agreement as to what would constitute the full record in this case. BN cannot circumscribe such an obligation by contending that the additional materials are important, relevant, public documents. Accordingly, plaintiffs' motion to strike attachments shall be granted.

Summary Judgment ("NMB's Motion"), at 2. The Stipulated Record includes pleadings that were submitted in Civil Action No. 89-3306.

In dismissing Civil Action No. 89-3306, the Court concluded, "Absent a specific, clear statement that the Board shall not investigate *except* upon the request of an employee or representative, the Court lacks jurisdiction to imply such a requirement; this is precisely the kind of dispute that is within the unreviewable discretion of the NMB." Civil Action No. 89-3306, Memorandum Opinion, June 10, 1991, at 7 (emphasis in original). Similarly, in the instant action, because judicial review of NMB decisions is extremely limited, this Court lacks jurisdiction to review the merger procedures that were promulgated by NMB and that permit carriers to invoke NMB's authority to investigate representation disputes.

Accordingly, for the reasons expressed above, in the Memorandum Opinion issued in Civil Action No. 89-3306, and in the July 3, 1991 Order denying plaintiffs' motion to alter judgment issued in Civil Action No. 89-3306, it is hereby

ORDERED that plaintiffs' motion to strike attachments to the motion for judgment on the pleadings or, in the alternative, for summary judgment filed by Burlington Northern Railroad Company is granted; it is

FURTHER ORDERED that defendant National Mediation Board's motion to dismiss or, in the alternative, for summary judgment is granted; it is

FURTHER ORDERED that intervenor-defendant Burlington Northern Railroad Company's motion for judgment on the pleadings or, in the alternative, for summary judgment is granted; it is

FURTHER ORDERED that plaintiffs' motion for summary judgment is denied; and it is

FURTHER ORDERED that this case is dismissed.

IT IS SO ORDERED.

September 12, 1991.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX H

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

[LOGO]

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18 NMB No. 57

File No. MT-13
Case No. R-5731

IN THE MATTER OF THE
MERGER OF

NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD; SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY; PACIFIC COAST RAILWAY COMPANY; QUANAH, ACME & PACIFIC RAILWAY COMPANY; ALABAMA, TENNESSEE & NORTHERN RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; COLORADO & SOUTHERN RAILWAY COMPANY; FORT WORTH & DENVER RAILWAY COMPANY; BURLINGTON NORTHERN (OREGON-WASHINGTON), INC.

forming the

BURLINGTON NORTHERN
RAILROAD COMPANY

FINDINGS UPON INVESTIGATION—
TERMINATION OF CERTIFICATES—
AUTHORIZATION OF ELECTION

April 23, 1991

On June 14, 1989, the Burlington Northern Railroad Company (BN), pursuant to the Interim Procedures established by the Board in *Trans World Airlines/Ozark Airlines,* 14 NMB 218 (1989) and *Missouri Pacific Railroad (Union Pacific),* 15 NMB 95 (1988)[1], requested that the Board resolve several representation disputes that exist as a result of the merger from 1970 to 1985 of several railroads into the BN. The railroads which formed the Burlington Northern Railroad are the Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad; Spokane, Portland & Seattle Railway Company; Pacific Coast Railway Company; Quanah, Acme & Pacific Railway Company; Alabama, Tennessee & Northern Railway Company; St. Louis-San Francisco Railway Company; Colorado & Southern Railway Company; Fort Worth & Denver Railway Company; and Burlington Northern (Oregon-Washington), Inc. This matter was assigned NMB File No. MT-13.

Senior Hearing Officer Roland Watkins was assigned to conduct the investigation.

In NMB Case No. R-5731, the Independent Workers of North America (IWNA) filed an application alleging a representation dispute involving the craft or class of Boilermakers and Blacksmiths of the BN. The craft or class is currently represented by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB). That case is included here

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[1] In *TWA/Ozark, supra,* the Board established Interim Procedures to govern mergers in the airline industry. These Interim Procedures were made applicable to the railroad industry in *Missouri Pacific, supra.* On November 27, 1989, the Board issued *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Railroad Industry,* 17 NMB 44 (1989), establishing Final Procedures for resolving these representation issues. The Final Procedures have now superceded the Interim Procedures.

because its disposition depends on the craft or class determinations made herein.

Record of Certifications

Review of the Board's records reveals that over the years, several organizations were certified to represent various crafts or classes on the eleven railroads which formed the BN. In all, there are approximately 85 certifications involved in this merger dating from 1934 to 1976. A review of those carriers and their certifications is in the following appendices:

Northern Pacific Railway Company—Appendix A
Great Northern Railway Company—Appendix B
Chicago, Burlington & Quincy Railroad—Appendix C
Spokane, Portland & Seattle Railway Company—Appendix D
Pacific Coast Railway Company—Appendix E
Quanah Acme & Pacific Railway Company—Appendix F
Alabama, Tennessee & Northern Railway Company—Appendix G
St. Louis-San Francisco Railway Company—Appendix H
Colorado & Southern Railway Company—Appendix I
Fort Worth & Denver Railway Company—Appendix J

There are no certifications on the Burlington Northern (Oregon-Washington).

The above certifications were issued to labor organizations which over the years have undergone name changes and mergers. Investigation revealed that on August 1, 1954, the Order of Railway Conductors changed its name to the Order of Railway Conductors and Brakemen. The Order of Railway Conductors and Brakemen, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen and the Switchmen's Union of North America merged in 1969 to form the United

Transportation Union (UTU). In 1985, the Railroad Yardmasters of America merged into the UTU.

The National Council of Railway Patrolmen's Union, in 1949, received an international charter from the American Federation of Labor and changed its name to the Railway Patrolmen's International Union (RPIU). On January 1, 1969, RPIU merged into BRAC. In 1978, the Brotherhood of Sleeping Car Porters merged with BRAC. The Brotherhood of Railway Carmen merged with BRAC in 1986. The Order of Railroad Telegraphers changed, in 1965, its name to the Transportation-Communication Employees Union which later merged with BRAC. On August 6, 1980, the American Railway Supervisors Association merged into BRAC. Effective September 1, 1987, BRAC changed its name to the Transportation Communications Union (TCU). The Railway Employees Department of the AFL-CIO was dissolved on September 30, 1980. On July 1, 1951, IBBDFH and IBBIS merged to form the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB).

ISSUES

The following issues are before the Board:

1) Whether the carriers listed above have merged into the BN so as to form a single transportation system for purposes of the Railway Labor Act and;

2) If a single transportation system was created, what effect, if any, does this have on the representation certifications on the merged carriers?

CONTENTIONS

Burlington Railroad submitted comments and furnished information on June 14, July 3, and August 16, 1989. Comments were also submitted on July 2, August 1 and 16 and September 24, 1990.

Written comments were submitted by the BLE on June 23, July 6, and August 23, 1989 and August 1, 1990. The UTU submitted written comments on July 12, and August 24, 1989 and August 6, 1990. The United Brotherhod of Carpenters and Joiners of America furnished written comments on July 20, and August 30, 1989. The BRS submitted comments on August 3 and 13, 1990. On August 27, 1990, comments were submitted by the Railway Labor Executives' Association (RLEA). The RLEA is an association of the chief executive officers of seventeen labor organizations. These organizations represent a substantial majority of the nation's railroad employees.

BN

The BN contends that it is a single transportation system and that the certificates of representation on the predecessor railroads should be terminated. BN requests that the Board declare "a single representative for each of the system-wide crafts or classes on BN." The Carrier asserts that "there currently exists multiple general chairmen or general committees of adjustment claiming representation of employees in the crafts or classes of firemen, conductors, brakemen (trainmen), yardmasters and yardmen (switchmen), which purported representation covers the territory formerly operated by one or more of the predecessor railroad companies."

BLE

It is the BLE's position that BN's petition should be dismissed for several reasons. First, BLE contends that the Board lacks the authority under the Railway Labor Act "to permit rail carriers to invoke its services under Section 2, Ninth of that Act and without issuing the notice and holding the hearing specified in *TWA/Ozark Airlines,* 14 NMB 241." BLE also contends that the Interim Procedures were issued by the Board "without notice or opportunity for participation by the railroad unions."

These Interim Procedures, the BLE argues, are not required for the railroad industry and are in conflict with the merger protective agreements and the labor protective conditions imposed by the Interstate Commerce Commission.

BLE argues that the BN's request is not timely because of the passage of time since these mergers occurred. Finally the BLE argues that the Board "should refrain from entering any order holding or even suggesting that one collective bargaining agreement or a single designated representative or person applies to a craft."

UTU

It is the UTU's position that the BN's petition must be dismissed because carriers may not invoke the Board's services under Section 2, Ninth, of the Act. The Organization contends that the petition is a "thinly-veiled attempt to achieve a single system agreement indirectly, which BN has been unable to achieve with UTU's General Chairpersons informally and in pending mediation cases off and on for nearly 20 years." UTU argues that there is no representation dispute because the Organization, not the General Committee, is the certified representative.

United Brotherhood of Carpenters and Joiners (UBCJ)

It is the Organization's position that there is no representation dispute. The Organization contends that the BN is not "statutorily entitled to invoke the NMB's representation dispute procedures." The *Missouri Pacific* decision, UBCJ argues, is not applicable because the BN mergers predated this decision. For those reasons, UBCJ contends that the petition should be dismissed.

BRS

BRS contends that there is no representation dispute. According to the Organization, "every signal worker on

the BN system is represented by BRS." The Organization states that "BN's problem, if any, is with the scope rule covering signal/communications workers on C&S, FW&D and JTD."

Railway Labor Executives' Association (RLEA)

In a position statement filed on behalf of its member organizations, RLEA argues that action on the BN's request is unwarranted. RLEA contends that there is no representation dispute.

FINDINGS OF LAW

Determination of the issues in this case is governed by the Railway Labor Act, as amended, 45 U.S.C. § 151, et seq. Accordingly, the Board finds as follows:

I.

BN is a common carrier as defined in 45 U.S.C. § 151, First.

II.

BMWE, IBEW, TCU, UTU, BLE, IBFO, SMWIA, IBB, IAM&AW, UBCJ, BRS, ILA and ATDA are labor organizations and representatives as provided by 45 U.S.C. § 151, Sixth and § 152, Ninth.

III.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter."

IV.

45 U.S.C. § 152, Ninth, provides that the Board has the duty to investigate representation disputes and shall

designate who may participate as eligible voters in the event an election is required.

FINDINGS OF FACT

I.

In 1970, the NP, GN, CB&Q, PC and SP&S were merged into a company named Great Northern Pacific & Burlington Lines, Inc., which later became known as Burlington Northern Inc. (BNI). The AT&N, in 1970, was merged into the Frisco. In 1980, the Frisco was merged into BNI. In 1981, the QA&P was merged into BNI. Also in 1981, BNI created the Burlington Northern Holding Company (BNHC) which created a wholly owned subsidiary named Burlington Northern Transportation Company (BNTCO). The BNI then merged into BNTCO. BNHC was renamed BNI. BNTCO was renamed BN. C&S was merged into BN in late 1981. In 1983, the FW&D was merged into BN. In 1985, Burlington Northern (Oregon-Washington) Inc. was merged into BN. It is not disputed by the labor organizations that the predecessor railroads have merged to form the BN.

According to information furnished by the BN, the BN is a single corporate entity, incorporated under the laws of the State of Delaware. The predecessor railroads all have ceased to exist in a legal sense, as a result of appropriate and necessary resolutions of the various boards of directors of the predecessor railroads which have been passed and implemented, and as a result of filings made in compliance with state corporation and merger law requirements. Therefore, the predecessor railroads no longer exist as a matter of the law of their respective states of incorporation.

II.

BN has submitted information explaining that it holds a single common carrier operating certificate from the

ICC; certificates of predecessor railroads were extinguished. All reports to the Federal Railroad Administration (FRA) are prepared and filed for BN as a single carrier. Similarly, reporting to state and local authorities as required by state law is done by BN employees or their agents on behalf of the single BN system.

With respect to its freight operations, all train movements on the BN system are directed, controlled and managed by BN employees. Train briefs, schedules and timetables governing the movement of trains on the BN system are centrally coordinated and printed with the BN name and logo. Communications systems on the BN are unified and integrated.

BN locomotives and freight cars bear the BN system color scheme and logo. All BN freight car tracking, location, distribution and allocation functions are centrally computerized on the BN. All bills of lading, freight bills and other such transportation-related documents are uniform and in the name of BN. All tariffs relating to prices or services offered by BN are in the name of BN and apply system-wide. BN's transportation services are marketed and sold to the public as BN services on a fully-integrated system-wide basis.

Payroll and accounting systems for the BN are centralized and system-wide. All labor relations functions on the BN are carried out for the single BN system on an integrated basis.

III.

According to the BN, there are no active BN employees who were employed by the predecessor railroads in several of the certifications listed in Appendices A-J. Those certifications for which there are no active BN employees are listed in Appendix K.

IV.

A.

BN's breakdown of active employees is listed in Appendix L.

B.

A comparison of employees at the predecessor railroads and the present workforce is located in Appendix M.

C.

In 1981, BN acquired a segment of trackage from the Washington, Idaho & Montana Railway Company (WIM). BN hired three employees who worked on that segment of trackage. Those employees, while they worked for the WIM, were allegedly represented by the Inland Empire District Council (Lumber, Production & Industrial Workers) Local No. 2766 (Inland Empire) chartered by the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. According to the BN, these employees are within the crafts or classes of conductors, trainmen or yardmen. Inland Empire contends it is the representative of these employees. UBCJ also allegedly represents one engineer and four persons in the Maintenance of Way craft or class on the same segment of track.

DISCUSSION

I.

A.

Section 2, Ninth, of the Act, 45 U.S.C. § 152, Ninth requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representation, and to certify the duly authorized representatives of such employees. Courts have interpreted the Act as giving the Board exclusive jurisdiction over representation questions. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943); *General Committee of*

Adjustment v. M.K.T. Railroad, 320 U.S. 323 (1943); *Ruby v. American Airlines, Inc.*, 323 F. 2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Air Line Pilots Association v. Texas Int'l Airlines, Inc.*, 656 F. 2d 16 (2d Cir. 1981); *Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040 (D.C. Cir. July 18, 1989); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F. 2d 975 (1st Cir. 1976); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.*, 656 F. 2d 16 (2d Cir. 1981); *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F. 2d 157 (5th Cir. 1983); *Brotherhood of Ry. Clerks v. United Airlines, Inc.*, 325 F. 2d 576 (6th Cir. 1963); *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F. 2d 967 (7th Cir. 1986). Questions as to whether carriers will be treated separately or combined for representation purposes, or whether their respective employees will fall under one or more crafts or classes, are the type of representation questions the NMB is required to answer under Section 2, Ninth. It is because such questions exist here that the matter is appropriately before the NMB.

B.

As noted above in the section entitled Contentions, the BLE contends that the Interim Procedures established were issued "without notice or opportunity for participation by the railroad unions." In addition, the Organization contends that the procedures are not necessary because the railroad mergers which have occurred have not raised, in the Organization's opinion, any representation questions.

In *Missouri Pacific, supra*, the Board established Interim Procedures for the resolution of merger representation issues in the railroad industry. Subsequently, the Board established Final Procedures for the same purpose pursuant to the Board's authority under Section 2, Ninth, of the Act.

The Board has plenary authority with respect to the impact of corporate mergers, acquisitions and consolidations on the NMB representation certifications. For example, the U.S. Court of Appeals for the Second Circuit in *Air Line Pilots Association v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 22 (2d Cir. 1981), concluded that "the NMB is empowered to, and has shown itself able, to decide representation disputes arising out of corporate restructurings. . . As the district court found, the NMB has shown itself alert to prevent carriers from frustrating representation rights by artful corporate devices." Further, in *Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), the U.S. Court of Appeals for the District of Columbia Circuit concluded:

> All of the courts of appeals to have considered the issue . . . have held that the question whether a union's certification survives [a] . . . merger is a matter within the exclusive jurisdiction of the NMB. *See, International Association of Machinists v. Northeast Airlines, Inc.*, 536 F. 2d 975, 977 (1st Cir. 1976); *Air Line Pilots Association v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981); *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Brotherhood of Ry. Clerks v. United Airlines, Inc.*, 325 F.2d 576, 579-80 (6th Cir. 1963); *Airline Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986).

It is equally well established that with respect to those matters subject to the Board's comprehensive authority, the determination of the particular investigative approach to be utilized is wholly within the NMB's discretion. As the Supreme Court found in *Railway Clerks v. Non-Contract Employees*, 380 U.S. 656 (1965), "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which

it should employ. . . ." The only limitation on the Board's authority with respect to such investigations are actions "made in excess of its delegated powers and contrary to a *specific prohibition* in the Act." *Id.* 380 U.S. at 659-660 (Emphasis in original).

One of the purposes of the Act is to ensure labor stability in the railroad industry. The Board is empowered to resolve questions of representation which arise from corporate mergers so as to ensure that stability. When there have been major changes in the actual operations of railroad systems, craft or class questions, as well as the question of who is the authorized or designated representative, may arise. Resolution of these questions promotes labor stability.

C.

UTU argues that the petition should be dismissed because carriers may not invoke the Board's services under Section 2, Ninth, of the Act. This argument was considered and rejected by the Board in its *Procedures for Handling Representation Issues Resulting from Mergers. Acquisitions or Consolidations in the Railroad Industry*, 17 NMB 44 (1989) and *Grand Trunk, supra.*

In view of the lack of any such "specific prohibition" in the Act cited in *Railway Clerks* above, those questioning the Board's authority to afford selective "standing" or other status to carriers in NMB merger investigations are limited to "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." *Railway Clerks*, 380 U.S. at 671. However, "it was to avoid the haggling and delays of litigation that such [policy] questions were left to the Board." *Id. See also, International Brotherhood of Teamsters v. Railway Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). The Interim Procedures reflect the Board's exercise of its plenary discretion over just such policy matters. BN properly filed on June 14, 1989, in accordance with the Interim Procedures. We find that the

BN's filing under the Interim Procedures triggered Board review under the Final Procedures. Therefore, the matter of BN's merger is properly before us.

D.

BLE argues that the BN's request is untimely because of the passage of time—in some cases, it has been up to nineteen years since the mergers occurred. This type of argument was also considered and rejected by the Board in its *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry, supra,* and *Grand Trunk, supra,* because it ignores the fact that there may be continuing representation questions in those situations in which the merger has occurred. For example, the Board in *Central of Georgia Railroad (Norfolk Southern Corp. Subsidiaries),* 16 NMB 5 (1988), and *Ogden Union Railway and Depot Company,* 16 NMB 398 (1989), dismissed the representation applications after finding that the subject entity in each case was not the appropriate system as a result of mergers which had occurred. The Board takes note of the fact that it has retained jurisdiction in merger cases in the airline industry because of continuing representation problems. *TWA/Ozark, supra; Delta/Western,* 14 NMB 291 (1987); *American AirCal,* 14 NMB 412 (1989). As in airline mergers, there are continuing representation problems in railroad mergers. These continuing representation questions create instability which the Act seeks to avoid. A remedy to that instability can be achieved through the merger procedures established by this Board.

When there have been major changes in the actual operations of railroad systems, craft or class changes may occur resulting in the question of who is the authorized or designated representative. For these reasons, the Board, under Section 2, Ninth, of the Act, cannot ignore the changed conditions where these representation ques-

tions arise. *Air Line Pilots Association v. Texas Int'l Airlines, Inc., supra,* and *Grand Trunk, supra.*

E.

BLE contends that the merger procedures are in conflict with the merger protective agreements and the labor protective conditions imposed by the Interstate Commerce Commission. The BLE has not shown how this alleged conflict arises. In any event, the Board notes that its procedures have no effect on the survival of existing collective bargaining agreements or any rights therein.

F.

In *TWA/Ozark, supra,* the Board clarified its airline merger policy. In that decision, the Board enunciated factors which will be examined to determine whether carriers operate or will operate as a single transportation system. These factors were specifically made applicable to railroad mergers in *Missouri Pacific, supra.*

The following factors were cited by the Board in *TWA/Ozark, supra,* as indicia of a single transportation system:

> . . . whether the two systems are held out to the public as a single carrier . . . whether a combined schedule is published; how the carrier advertises its services; . . . if signs, logos and other publicly visible indicia have been changed to indicate only one carrier's existence; whether personnel with public contact were held out as employees of one carrier; and whether the process of repainting . . . equipment, to eliminate indications of separate existence, has been progressed.
>
> Other facts investigated by the Board seek to determine if the carriers have combined their operations from a managerial and labor relations perspective. Here the Board investigates whether labor relations and personnel functions are handled by one carrier;

whether there are a common management, common corporate officers and interlocking Boards of Directors; whether there is a combined workforce; and whether separate identities are maintained for corporate and other purposes.

These factors were applied by the Board in *Grand Trunk, supra.* The Board noted in that decision that although certain of the factors considered in an airline merger case are inapplicable in a railroad case, most of these factors are relevant to the Board's investigation of a railroad merger.

After a review of the evidence, the Board finds that the operations of the predecessor railroads have been previously merged into the BN. Indeed this fact is not disputed by the organizations. Identification logos and other publicly visible indicia of the predecessor railroads have been removed and replaced with BN's name and logo. The former railroads are operating with B&N personnel under a single BN schedule. Labor relations for the former railroads is handled by BN personnel. Therefore, a single transportation system exists on the BN for purposes of the Railway Labor Act.

II.

Section 2, Ninth of the Railway Labor Act provides for representation of employees or subordinate officials on a craft or class basis. The Board has consistently held that such representation must be on a system-wide basis. The craft or class must include all of the employees working in classifications deemed eligible, regardless of work locations. *Ogden Union Railway and Depot Company, supra; Norfolk Southern,* 16 NMB 355 (1989); *Metra,* 16 NMB 175 (1989); *National Railroad Corp.,* 12 NMB 80 (1985); *Grand Trunk Western Railroad, supra; Offshore Logistics, Aviation Services Division d/b/a Air Logistics,* 11 NMB 144 (1984); *Alia Royal Jordanian Airlines,* 10 NMB 389 (1983); and *Varig Airlines,* 10

NMB 223 (1983). The Board's longstanding practice, in keeping with its statutory mandate, is to certify only unions that represent the majority of a system-wide craft or class of employees. Furthermore, the system-wide nature of Railway Labor Act crafts or classes is well-established in the railway industry. *Atchison, Topeka & Santa Fe*, 1 NMB 62 (1938); *Seaboard System Railroad-Clinchfield Line*, 11 NMB 217 (1984); *Missouri Pacific, supra; CSX Transportation*, 15 NMB 129 (1988); *Central of Georgia Railroad (Norfolk Southern Corp. Subsidiaries), supra; Ogden Union Railway and Depot Company, supra*; and *Grand Trunk, supra.*

III.

Since this Board has found that the predecessor entities have merged into the BN so as to form a single transportation system, the Board must now consider what effect, if any, this finding has on the representation that exists on these entities.

Pursuant to Section 2, Ninth, the Board upon investigation has exclusive authority to grant, withhold and revoke representation certifications. *TWA/Ozark, supra.* Absent Board approval, no certifications may terminate by action of any carrier. *Id.*

A.

A comparison of the eighty-five certifications reveals that except in the following five instances, there are no conflicting representatives for a particular craft or class. According to the BN, however, there are no employees covered by these five certifications on the entire system. HREBUI holds certifications to represent Dining Car Employees on NP (R-2589) and GN (R-2588) while TCU holds certifications for the same craft or class on CB&Q (R-3748) and C&S (R-3232). In reference to the craft or class of Mechanical Department Foremen & Supervisors, the Northern Pacific Mechanical Foreman's Asso-

ciation is certified on the NP (R-1521); TCU is certified on CB&Q (R-1254) and the C&S (R-2764); and John L. Smith is certified on the FW&D (R-3502). TCU is certified to represent the craft or class of Technical Engineers, Architects, Draftsmen and Allied Workers on the NP (R-3439) while the Professional Engineers Committee, St. Louis-San Francisco Railway Company is certified on the Frisco (R-2598). TCU is certified to represent Train Porters on the CB&Q (R-3746) while ARTLF is certified to represent the same craft or class on the Frisco (R-2877). ARTLF is certified to represent the craft or class of Chair Car Porters on the Frisco (R-2877) while TCU is certified for the group on the C&S (R-2216).

B.

Investigation has revealed that the NP, GN, CB&Q, SP&S, PC, QA&P, AT&N, Frisco, C&S, FW&D and Oregon-Washington have merged into the BN so as to form a single transportation system. These merged entities have therefore ceased to exist. For these reasons, the certifications on these entities are extinguished. The following certifications on the NP are hereby extinguished as of the date of this decision:

R-3629
R-3597
R-3249
R-2589
R-2317
R-259
R-197

The following certifications on the SP&S are hereby extinguished as of the date of this decision:

R-4062
R-3662
R-2763
R-2753
R-1522

R-638
R-34

The following certifications on the PC are hereby extinguished as of the date of this decision:

R-1940
R-1939
R-1128

The certification in R-1005 on the QA&P is hereby extinguished as of the date of this decision.

The following certifications on the AT&N are hereby extinguished as of the date of this decision:

R-3813
R-2155
R-1013

The following certifications on the Frisco are hereby extinguished as of the date of this decision:

R-3592
R-2877
R-2598
R-2503
R-2556
R-1512
R-723
R-18

The following certifications on the GN are hereby extinguished as of the date of this decision:

R-3797
R-3562
R-3439
R-3272
R-2606
R-2588
R-1977
R-1778

R-1473
R-583
R-497
R-3
R-13

The following certifications on the CB&Q are hereby extinguished as of the date of this decision:

R-4066
R-3748
R-3749
R-2553
R-1493
R-1411
R-1287
R-1254
R-688
R-660
R-524
R-192
R-193
R-258
R-2347
R-2263
R-1854
R-1728
R-1421
R-1200
R-977

The following certifications on the C&S are hereby extinguished as of the date of this decision:

R-4236
R-3603
R-3232
R-2993
R-2764
R-2216
R-859
R-679

The following certifications on the FW&D are hereby extinguished as of the date of this decision:

R-294
R-370
R-322
R-3502
R-3264
R-2590
R-3261
R-4586
R-3700
R-3490
R-3228
R-2453
R-1674
R-683

C.

During the investigation of this petition, the Board conducted an exhaustive review of its records to ascertain the certifications involved. Due to the number of railroads and certifications involved, there may exist valid certifications on the predecessor railroads or other entities which were not discovered in the investigation resulting in this decision. For this reason, the Board finds that it is necessary to issue a general extinguishment of all certifications on the predecessor railroads. As of the date of this decision, therefore, any certification on any of the predecessor railroads or any part thereof is hereby extinguished.

IV.

There have been no certifications issued on the BN. BN, however, has voluntarily recognized unions representing its employees. Although there are instances of representation by multiple committees of adjustment, BN states that the following crafts or classes on the BN system are represented by the named labor organization:

Train Dispatchers—ATDA
Signalmen—BRS
Carmen—TCU
Machinists—IAM&AW
Boilermakers & Blacksmiths—IBB
Electricians—IBEW
Firemen & Oilers—IBF&O
Sheet Metal Workers—SMWIA
Clerks—TCU
Patrolmen—TCU

The Board finds that the above organizations represent the above crafts or classes on a system-wide basis on the BN. *Federal Express/Flying Tiger, supra,* and *Grand Trunk, supra.*

V.

A comparison of the certifications and the voluntary recognitions reveals that in certain instances there are conflicting representatives. In R-4236 and R-4586, BLE was certified to represent the craft or class of Locomotive Firemen on the C&S and FW&D, respectively. Pursuant to voluntary recognition, UTU represents this craft or class on the CB&Q, GN, NP and SP&S. The employees involved total two for the BLE and 240 for the UTU.

Inland Empire claims that it represents three employees who are either Trainmen or Yardmen. It is uncontested the remaining 5,697 individuals in the crafts or classes of Trainmen and Yardmen on the BN system are represented by the UTU.

Further, UBCJ claims to represent one Engineer and four individuals in the Maintenance of Way craft or class on the BN system while the BLE and BMWE represent the remaining 2,785 and 4,747 employees, respectively.

In the present case, there are no comparably sized crafts or classes with conflicting representation. After a full review of the record in this matter, the Board is able to determine that a system-wide majority exists in each

craft or class. *USAir/Piedmont Aviation, supra* and *Federal Express/Flying Tigers, supra.*

The Board finds that the named labor organizations are the representatives for the respective crafts or classes on a system-wide basis:

Locomotive Firemen—UTU
Trainmen—UTU
Yardmen—UTU
Engineers—BLE
Maintenance of Way—BMWE

VI.

In R-5731, the Independent Workers of North America (IWNA) filed an application alleging a representation dispute involving the craft or class of Boilermakers and Blacksmiths of the BN. According to the BN, this group is represented by IBB. On the basis of its investigation the Board finds a dispute to exist among the craft or class of Boilermakers and Blacksmiths of the BN. An all mail ballot election is authorized using the last day of the last payroll period prior to the date of this decision as the cut-off date.

CONCLUSION

Based on the foregoing and a review of the record before it, the Board finds that the NP, GN, CB&Q, AT&N, Frisco, C&S, FW&D, PC, QA&P, SP&S and Burlington Northern (Oregon—Washington) have merged to form the BN and that a single transportation system exists on the BN for purposes of the Railway Labor Act. The certifications on the predecessor railroads are hereby extinguished effective the date of this decision. Any certification which may exist on any part of the predecessor railroads which are now a part of the BN is hereby extinguished. The Board also finds that the labor organizations listed in IV and V of the Discussion are the representatives for the respective crafts or classes on the BN on a system-wide basis.

The Board finds a dispute to exist in R-5731 among the craft or class of Boilermakers and Blacksmiths of the BN. An all mail ballot election is authorized using the last day of the last payroll period prior to the date of this decision as the cut-off date. Applicant IWNA and incumbent IBB will appear on the ballot. The count will take place in Washington, D.C.

By direction of the NATIONAL MEDIATION BOARD.

/s/ William A. Gill Jr.
WILLIAM A. GILL, JR.
Executive Director

Appendix A

NORTHERN PACIFIC RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-3629	10-18-63	Sergeants, Assistant Special Agents, Patrolmen & Watchmen	Railway Patrolmen's Int'l Union, AFL-CIO
R-3597	2-13-63	Stewardess—Nurses	Washington State Nurses Association, Inc.
R-3249	5-09-58	Road Conductors	Order of Railway Conductors & Brakemen
R-2589	9-16-52	Dining Car Employees, Including Chefs, Cooks & Waiters	Joint Council Dining Employees, Local 516, Hotel & Restaurant Employees & Bartenders Int'l Union
R-2317	8-18-50	Cooks, Waitresses, Maids, Porters, Dishwashers & Related Employees	Hotel & Restaurant Employees & Bartenders Int'l Union
R-2556	6-23-52	Yardmen (Foremen, Helpers & Switchtenders)	Brotherhood of Railroad Trainmen
R-1512	1-11-46	Mechanical Department Foremen & Supervisors	Northern Pacific Mechanical Foremen's Association
R-723	2-19-41	Electrical Workers & Helpers (including Equipment Inspectors, Installers & Repairmen, Foremen, Assistant Foremen, Linemen, Assistant Linemen, Framers & Groundmen in the Telegraph & Telephone Maintenance & Construction Department	Int'l Brotherhood of Electrical Workers
R-18	10-13-34	Machinists; Boilermakers; Blacksmiths; Sheet Metal Workers; Carmen; Firemen & Oilers	Railway Employees Department of the American Federation of Labor

Appendix B

GREAT NORTHERN RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-3797	4-29-66	Road Brakemen (Brakemen & Train Baggagemen)	Order of Railway Conductors & Brakemen
R-3562	8-28-62	Subordinate Officials, Maintenance of Way & Structures Department (including District Roadmasters, Assistant Suprevisor of Bridges & Buildings, Supervisor of Signals, General Foremen)	Great Northern Railway Supervisors
R-3439	12-07-60	Technical Engineers, Architects, Draftsmen & Allied Workers	American Railway Supervisors Association
R-3272	7-31-58	Yardmen	Switchmen's Union of North American
*R-2606	10-30-53	Assistant Chief Engineers, Substation Motor Attendants & Their Helpers employed at the St. Paul General Office Building Power Plant	Leonard H. Thom
R-2588	8-26-52	Dining Car Employees, including Chefs, Cooks, Waiters-in-Charge, Waiters, Buffet & Lounge Car Porters	Hotel & Restaurant Employees & Bartenders Int'l Union
R-1977	4-12-48	Yardmasters	Order of Railway Conductors
R-1778	5-20-47	Agents, Telegraphers & Towermen	Order of Railroad Telegraphers
R-1473	9-21-45	Patrolmen (including Lieutenants, Sergeants & Watchmen	National Council of Railway Patrolmen's Union

* The Board found that these classifications constituted "a unique group which cannot be allocated to any specific craft or class." The Board stated that this finding was not a craft or class determination. *Northern Railway Company and the Northern Pacific Railway Company*, 3 NMB 144 (1953).

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-583	1-10-40	Machinists (including Apprentices & Helpers)	Int'l Assoc. of Machinists & Aerospace Workers
R-538	1-10-40	Blacksmiths (including Apprentices & Helpers)	Int'l Brotherhood of Blacksmiths, Drop Forgers & Helpers
R-538	1-10-40	Boilermakers (including Apprentices & Helpers)	Int'l Brotherhood of Boilermakers, Iron Ship Builders & Helpers
R-583	1-10-40	Sheet Metal Workers, Apprentices & Helpers	Sheet Metal Workers Int'l Association
R-583	1-10-40	Carmen (including Coach Cleaners)	Brotherhood of Railway Carmen
R-497	10-31-38	Electrical Workers, Apprentices & Helpers	Int'l Brotherhood of Electrical Workers
R-1011	7-07-43	Amended R-497 to include: Switchboard Operators & Generator Attendants in Power House at Allouez One Docks	
R-3	11-02-34	Employees in the Signal Department	Brotherhood of Railroad Signalmen
R-13	9-25-34	Employees of Peppard & Tutton Co., Contractors Operating Ore Lock at Superior, Wisconsin	Int'l Longshoremen's Association

Appendix C

CHICAGO, BURLINGTON & QUINCY RAILROAD

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-4066	3-7-69	Sleeping Car Porters & Attendants	Brotherhood of Sleeping Car Porters
R-3748	7-07-65	Dining Car Employees	Brotherhood of Sleeping Car Porters
R-3749	7-07-65	Train Porters	Brotherhood of Sleeping Car Porters
R-2553	10-08-53	Train Dispatchers, including Chief, Night Chief, Trick, Relief & Extra Train Dispatchers	American Train Dispatcher Assoc.
R-1493	9-21-45	Restaurant & Lunch-room Employees	Hotel & Restaurant Employees & Bartenders Int'l Union
R-1411	7-14-45	Foremen Below the Rank of General Formen Supervising Electrical Workers in Telegraph & Telephone Department	Int'l Brotherhood of Electrical Workers
R-1287	11-18-44	Road Conductors	Order of Railway Conductors
R-1254	8-19-44	Mechanical Department Foremen & Supervisors	American Railroad Supervisors Association
R-688	11-07-40	Ushers (Red Caps)	United Transport Service Employees of America
R-660	9-11-40	Tap Room Employees	Brotherhood of Rail-road Trainmen
R-524	5-20-39	Machinists	Int'l Assoc. of Machinists & Aerospace Workers
R-524	5-20-39	Boilermakers	Int'l Brotherhood Boilermakers, Iron Ship Builders & Helpers

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-524	5-20-39	Blacksmiths	Int'l Brotherhood of Blacksmiths, Drop Forgers & Helpers
R-524	5-20-39	Sheet Metal Workers (including Molders)	Sheet Metal Workers Int'l Association
R-524	5-20-39	Electrical Workers (including Linemen & Groundmen)	Int'l Brotherhood of Electrical Workers
R-524	5-20-39	Carmen (including Coach Cleaners)	Brotherhood of Railway Carmen
R-727	3-31-41	Amended R-524 to include: Steamfitters in the Engineering Department	
R-1873	9-12-47	Amended R-524 to include: Carmen, Helpers & Apprentices in the Stores Department of the Carrier at Havelock, Nebraska	
R-192	10-09-36	Section Track & Bridge & Bulding Foremen (including Assistant Foremen); Bridge & Building Mechanics & Helpers; Equipment, Machine & Tool Operators & Helpers; Water Service Repairmen & Helpers; the Apprentices of all the Foregoing; Pipers, Track Welders, their Helpers and Apprentices; Section, Bridge & Building Laborers; Extra Gang Laborers; Extra Gang Foremen (including Assistant Foremen); Extra Gang Laborers (other than Track & Roadway); Bridge Operators & Helpers; & Crossing & Bridge Flagmen & Gateman	Brotherhood of Maintenance of Way Employes

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-762	5-24-41	Amended R-192 to include: Stock Yard Employees, (Stock Yard Feeders, Laborers, Farmers & Teamsters)	
R-258	8-17-36	Yardmasters & Assistant Yardmasters	Railroad Yardmasters of America
R-259	7-27-36	Dining Car Conductors & Stewards	Brotherhood of Railroad Trainmen
R-197	6-29-36	Power House Employees & Railway Shop Laborers	Int'l Brotherhood of Firemen & Oilers

Appendix D

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-4062	3-07-69	Hotel & Restaurant Employees at Wishram Lunchroom & Hotel, including Cashiers, Cooks, Waitresses, Maids, Janitors & Related Employees	Hotel & Restaurant Employees & Bartenders Int'l Union
R-3662	5-21-64	Yardmen (Foremen, Helpers, Switchtenders)	Brotherhood of Railroad Trainmen
R-2763	8-19-54	Road Conductors	Order of Railway Conductors & Brakemen
R-638	6-13-40	Carmen (including Coach Cleaners), Helpers & Apprentices	Brotherhood of Railway Carmen
R-34	10-30-34	Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Firemen & Oilers & their Helpers & Apprentices	Railway Employes' Department of the American Federation of Labor
R-34	10-30-34	Water Service Mechanics & Helpers	Brotherhood of Maintenance of Way Employes
R-34	10-30-34	Electrical Workers	Associated Organization of Shop Craft Employees, Great Northern Railway

Appendix E

PACIFIC COAST RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-1940	12-08-47	Yardman (Foremen & Helpers)	Brotherhood of Railroad Trainmen
R-1939	12-08-57	Road Brakemen	Brotherhood of Railroad Trainmen
R-1128	8-19-44	Road Conductors	Order of Railway Conductors

Appendix F

QUANAH, ACME & PACIFIC RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-1005	12-07-42	Machinists	Int'l Association of Machinists & Aerospace Workers
R-1005	12-07-42	Carmen (including Coach Cleaners, Helpers & Apprentices)	Brotherhood of Railway Carmen
R-1005	12-07-42	Power House Employees & Railway Shop Laborers	Int'l Brotherhood of Firemen & Oilers

Appendix G

ALABAMA, TENNESSEE & NORTHERN RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-3813	3-04-66	Locomotive Engineers	Brotherhood of Lomomotive Engineers
R-2155	5-05-49	Train Dispatchers	American Train Dispatchers Association
R-1013	4-26-43	Road Conductors	Order of Railway Conductors

Appendix H

ST. LOUIS—SAN FRANCISCO RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-3592	1-23-63	Road Conductors	Order of Railway Conductors & Brakemen
R-2877	10-07-54	Train Porters & Chair Car Porters	Association of Railway Trainmen & Locomotive Firemen
R-2598	8-21-52	Technical Engineers, Architects, Draftsmen & Allied Workers	Professional Engineers Committee, St. Louis—San Francisco Railway Company
R-2503	2-25-52	Restaurant Workers	Hotel & Restaurant Employees & Bartenders Int'l Union
R-2347	11-08-50	Traveling Maintenance of Way Mechanics	Brotherhood of Maintenance of Way Employees
R-2263	4-04-50	Laundry Employees	Int'l Brotherhood of Firemen & Oilers
R-1854	8-22-47	Coal Tipple Operators	Int'l Brotherhood of Electrical Workers
R-1782	11-19-46	Dining Car Stewards	Brotherhood of Railroad Trainmen
R-1421	5-15-45	Yardmasters	Railroad Yardmasters of America
R-1200	4-13-44	Machinists	Int'l Association of Machinists & Aerospace Workers
R-1200	4-13-44	Electrical Workers, Helpers & Apprentices	Int'l Brotherhood of Electrical Workers
R-1302	11-16-44	Amended R-1200 to include: Linemen	

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-977	12-29-42	Boilermakers	Int'l Brotherhood of Boilermakers, Iron Ship Builders & Helpers
R-977	12-29-42	Blacksmiths	Int'l Brotherhood of Blacksmiths, Drop Forgers & Helpers
R-977	12-29-42	Sheet Metal Workers	Sheet Metal Workers Int'l Association
R-977	12-29-42	Carmen (including Coach Cleaners, Helpers & Apprentices)	Brotherhood of Railway Carmen
R-977	12-29-42	Power House Employees Railway Shop Laborers	Int'l Brotherhood of Firemen & Oilers

Appendix I

COLORADO & SOUTHERN RAILWAY COMPANY

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-4236	10-12-71	Locomotive Firemen & Hostlers, & Outside Hostler Helpers	Brotherhood of Locomotive Engineers
R-3603	4-10-63	Yardmen	Brotherhood of Railroad Trainmen
R-3232	11-25-57	Dining Car Employees	Brotherhood of Sleeping Car Porters
R-2993	11-28-55	Road Conductors	Order of Railway Conductors & Brakemen
R-2764	10-30-53	Mechanical Department Foremen and/or Supervisors of Mechanics	American Railway Supervisors Association
R-2216	11-21-49	Chair Car Porters	Brotherhood of Sleeping Car Porters
R-859	1-30-42	Signal Department Employees (Signal Maintainer & Telegraph Linemen)	Brotherhood of Railroad Signalmen
R-679	10-18-40	Dining Car Stewards	Brotherhood of Railroad Trainmen

Appendix J

FORT WORTH & DENVER RAILWAY COMPANY

Investigation revealed that the Fort Worth & Denver Railway entered into line operating agreements with other railroads. The employees working under each agreement were treated as a separate carrier for representation purposes. In 1936, the Fort Worth & Denver Railway Company leased from the Burlington-Rock Island Railroad Company several shops, yards and a portion of its line. For years, the Fort Worth & Denver also operated the Joint Texas Division of Chicago, Rock Island and Pacific Railroad Company—Fort Worth & Denver Railway Company which the Board treated as a separate carrier. The Fort Worth & Denver City Railway Company and the Wichita Valley Railway Company were also treated as a separate carrier for representation purposes. Several certifications were issued covering employees of the Fort Worth & Denver Railway Company.

Fort Worth & Denver Railway Company
(Burlington—Rock Island Railroad Company)

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R.294	4-15-37	Machinists	Int'l Association of Machinists & Aerospace Workers
R.294	4-15-37	Boilermakers	Int'l Brotherhood of Boilermakers, Iron Ship Builders & Helpers
R.294	4-15-37	Blacksmiths	Int'l Brotherhood of Blacksmiths, Drop Forgers & Helpers
R.294	4-15-37	Sheet Metal Workers	Sheet Metal Workers Int'l Association
R.294	4-15-37	Electrical Workers	Int'l Brotherhood of Electrical Workers
R.294	4-15-37	Carmen (including Coach Cleaners)	Brotherhood of Railway Carmen

The above certifications covered "employees of the Fort Worth and Denver City Railway Company assigned to the Shops of the Burlington—Rock Island Railroad Company."

Fort Worth & Denver Railway Company
& Wichita Valley Railway Company

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-370	12-23-37	Power House Employees & Railway Shop Laborers	Int'l Brotherhood of Firemen & Oilers
R-322	3-25-37	Machinists	Int'l Association of Machinists & Aerospace Workers
R-322	3-25-37	Boilermakers	Int'l Brotherhood of Boilermakers, Iron Ship Builders & Helpers
R-322	3-25-37	Blacksmiths	Int'l Brotherhood of Blacksmiths, Drop Forgers & Helpers
R-322	3-25-37	Sheet Metal Workers	Sheet Metal Workers Int'l Association
R-322	3-25-37	Electrical Workers	Int'l Brotherhood of Electrical Workers
R-322	3-25-37	Carmen (including Coach Cleaners)	Brotherhood of Railway Carmen

Joint Texas Division of Chicago, Rock Island & Pacific Railway Company—Fort Worth & Denver Railway Company

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-3502	11-17-61	Mechanical Department Foremen and/or Supervisors of Mechanics	John L. Smith
R-3264	4-29-58	Coach Porters	Hotel & Restaurant Employees & Bartenders Int'l Union
R-2590	2-03-53	Combination Signal & Communication Employees	Brotherhood of Railroad Signalman
R-3261	4-29-58	Dining Car Employees	Hotel & Restaurant Employees & Bartenders Int'l Union

Fort Worth & Denver Railway Company

CASE NO.	DATE	CRAFT OR CLASS	ORGANIZATION
R-4586	3-10-76	Firemen	Brotherhood of Locomotive Engineers
R-3700	7-16-65	Road Conductors	Brotherhood of Railroad Trainmen
R-3490	7-11-61	Yardmen	Switchmen's Union of North America
R-3228	2-06-58	Dining Car Employees	Brotherhood of Sleeping Car Porters
R-2453	12-19-51	Shop Watchmen	Int'l Brotherhood of Firemen & Oilers
R-1674	10-04-46	Coach Porters	Brotherhood of Sleeping Car Porters
R-683	10-29-40	Dining Car Stewards	Brotherhood of Railroad Trainmen

Appendix K

No Active Employees in the Craft or Class

CASE NO.	CRAFT OR CLASS	PREDECESSOR RAILROAD
R-3597	Stewardess-Nurses	NP
R-1493	Restaurant & Lunchroom Employees	CB&Q
R-4062	Hotel & Restaurant Employees at Wishram Lunchroom and Hotel, including Cashiers, Cooks, Waitresses, Maids, Janitors & Related Employees	SP&S
R-1005	Carmen (including Coach Cleaners, Helpers and Apprentices)	QA&P
R-1005	Machinists (including Helpers & Apprentices)	QA&P
R-1005	Power House Employees & Railway Shop Laborers	QA&P
R-2155	Train Dispatchers	AT&N
R-2503	Restaurant Workers	Frisco
R-294	Blacksmiths	FW&D
R-322	Blacksmiths	FW&D
R-294	Boilermakers	FW&D
R-322	Boilermakers	FW&D
R-3264	Coach Porters	FW&D
R-1674	Coach Porters	FW&D
R-3261	Dining Car Employees	FW&D
R-683	Dining Car Stewards	FW&D
R-294	Electrical Workers	FW&D
R-322	Electrical Workers	FW&D
R-2589	Dining Car Employees	NP
R-2588	Dining Car Employees	GN
R-3748	Dining Car Employees	CB&Q
R-3232	Dining Car Employees	C&S

CASE NO.	CRAFT OR CLASS	PREDECESSOR RAILROAD
R-1521	Mechanical Department Foremen & Supervisors	NP
R-1254	Mechanical Department Foremen & Supervisors	CB&Q
R-2764	Mechanical Department Foremen & Supervisors	C&S
R-3502	Mechanical Department Foremen & Supervisors	FW&D
R-3439	Technical Engineers, Architects, Draftsmen, and Allied Workers	NP
R-2598	Technical Engineers, Architects, Draftsmen, and Allied Workers	Frisco
R-3746	Train Porters	CB&Q
R-2877	Train Porters	Frisco
R-2877	Chair Car Porters	Frisco
R-2216	Chair Car Porters	Frisco

Number of Active Employees

Appendix L

Engineers	2785
Train Dispatchers	385
Maintenance of Way Employees	4747
Signalmen	801
Carmen	2173
Machinists	1581
Boilermarkers & Blacksmiths	105
Electricians	1100
Firemen & Oilers	584
Sheet Metal Workers	310
Clerks	4722
Patrolmen	88
Firemen (including Hostlers)	317
Brakemen (Trainmen)	4173
Yardmen (Switchmen)	2308
Conductors	1884
Yardmasters	333
Total	28396

Appendix M

Comparison of Workforce at the Predecessor Railroads and Present BN

CRAFT OR CLASS	FORMER RR	NUMBER AT MERGER	PRESENT NUMBER
Engineers	C&BQ	950	1098
	NP	757	405
	GN	758	568
	SP&S	149	100
	Frisco	—	412
	Others *	—	202
		2614	2785
Maintenance of Way	CB&Q	1963	1642
	NP	2112	1090
	GN	1794	859
	SP&S	376	182
	Frisco	—	592
	Others *	—	382
		6265	4747
Train Dispatchers	CB&Q	85	159
	NP	98	89
	GN	81	88
	SP&S	14	—
	Frisco	—	49
	Others *	—	—
		278	385
Machinists	CB&Q	551	962
	NP	308	94
	GN	336	132
	SP&S	62	31
	Frisco	—	107
	Others *	—	11
		1257	1581
Firemen & Oilers	CB&Q	417	212
	NP	404	137
	GN	428	147
	SP&S	85	17
	Frisco	—	71
	Others *	—	—
		1334	584

Note: —means zero employees
* FWD, JTD, C&S, ATN

CRAFT OR CLASS	FORMER RR	NUMBER AT MERGER	PRESENT NUMBER
Conductors	CB&Q	532	884
	GN	371	430
	NP	369	260
	SP&S	60	67
	Frisco	—	293
	Others *	—	154
		1332	2088
Trainmen	CB&Q	1012	1486
	GN	845	841
	NP	736	525
	SP&S	128	131
	Frisco	—	513
	Others *	—	285
		2721	3781
Yardmen	CB&Q	1525	611
	GN	1006	342
	NP	1094	453
	SP&S	246	101
	Frisco	—	282
	Others *	—	127
		3871	1916
Locomotive Firemen	CB&Q	570	147
	GN	363	35
	NP	348	30
	SP&S	31	0
	Frisco	—	28
	Others *	—	2
		1312	242
Yardmasters	CB&Q	110	152
	GN	87	85
	NP	104	52
	SP&S	20	13
	Frisco	—	47
	Others *	—	22
		321	371
Carmen	CB&Q	1244	955
	GN	1388	196
	NP	1177	203
	SP&S	223	122
	Frisco	—	204
	Others *	—	53
		4032	1733

CRAFT OR CLASS	FORMER RR	NUMBER AT MERGER	PRESENT NUMBER
Sheet Metal Workers	CB&Q	133	157
	GN	170	33
	NP	95	35
	SP&S	13	—
	Frisco	—	22
	Others *	—	—
		411	247
Shop Electricians	CB&Q	280	312
	GN	292	68
	NP	203	60
	SP&S	37	4
	Frisco	—	44
	Others *	—	—
		812	488
Blacksmith & Boilermakers	CB&Q	59	55
	GN	65	11
	NP	50	15
	SP&S	7	—
	Frisco	—	9
	Others *	—	—
		181	90

(3) (2)

Nos. 94-890, 94-907

In the Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

NATIONAL RAILWAY LABOR CONFERENCE,
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

BURLINGTON NORTHERN RAILROAD COMPANY,
PETITIONER

v.

NATIONAL RAILWAY LABOR EXECUTIVES' ASSOCIATION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE REGIONAL AIRLINE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE REGIONAL AIRLINE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

This brief is submitted by the Airline Industrial Relations Conference ("Aircon") and the Regional Airline Association ("RAA"), as *amici curiae* in support of the petitioners.[1]

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court concurrently with this brief.

INTERESTS OF AIRCON AND RAA AS AMICI CURIAE

Aircon is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in these areas with respect to legislative, judicial and administrative matters. Its carrier members include most major and national scheduled air carriers in the United States.

The Regional Airline Association is a trade organization whose members are engaged in scheduled air transportation of passengers and cargo in short-haul markets throughout the United States and its territories. The RAA is chartered to promote a healthy business climate for the growth of regional airlines by working with appropriate legislative and regulatory bodies and with the public, the press and other organizations, on issues affecting the industry. In 1992, RAA members transported approximately 93 percent of all regional airline passengers.

Aircon, the RAA and their member air carriers have a substantial interest in this case.[2] The *en banc* decision of the lower court concludes by the barest majority (5 to 4) that the National Mediation Board ("NMB" or the "Board") lacked statutory authority under the Railway Labor Act ("RLA") to promulgate its *Railroad Merger Procedures*.[3] The decision therefore implicates the Board's counterpart *Airline Merger Procedures*[4] which apply to

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[2] The decision of the *en banc* panel of the lower court is reported as *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) and is also appended to Petitioner Burlington Northern Railroad Company's petition for writ of certiorari at pages 1a through 62a.

[3] *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Railroad Industry*, 17 NMB 44 (1989).

[4] *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Airline Industry*, 14 NMB 388 (1987).

Aircon's and RAA's member carriers.[5] Since the 1987 inception of the merger procedures, the Board has decided more merger cases under the *Airline Merger Procedures* than the *Railroad Merger Procedures* because of the greater frequency of such transactions in the airline industry.[6]

The *Airline Merger Procedures* are critical in the airline industry because they establish a reasoned and well-ordered procedure under which the Board will review and update its previous representation determinations (known as "certifications") regarding the unions that will represent employee groups (known as "crafts or classes"), in the wake of mergers or other transactions that change a carrier's corporate identity or structure. Because of the frequency of transaction-driven changes affecting union representations in the heavily-unionized airline industry, the *Airline Merger Procedures* have played a central role in avoiding labor strife and related litigation in this vital transportation industry.

Aircon and RAA fully support the positions taken by Petitioners National Railway Labor Conference ("NRLC") and Burlington Northern Railroad Company ("BN") with regard to the *Railroad Merger Procedures.* Neither of those entities, however, is an air carrier, or represents air carriers, or can speak directly to the particularly destabilizing impact on the airline industry of judicial invalidation of the *Airline Merger Procedures.* Aircon and RAA, therefore, respectfully submit that because of its potential impact on the airline industry, the *en banc* decision invalidating the parallel *Railroad Merger Procedures*

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[5] The *Railroad Merger Procedures* were developed by the Board in 1989 based on the *Airline Merger Procedures* developed earlier in 1987. *Railroad Merger Procedures*, 17 NMB at 44. An earlier challenge to the *Airline Merger Procedures* on similar grounds of NMB authority was rejected. *International Brotherhood of Teamsters v. NMB*, 118 Lab. Cas. (CCH) ¶ 10,678 (D.D.C. 1990).

[6] *See* Note 7 *infra.*

presents an important question of federal law within the meaning of Rule 10.1(c) of this Court.

ARGUMENT

I. THE *EN BANC* DECISION WILL HAVE A DESTABILIZING EFFECT ON LABOR RELATIONS IN THE AIRLINE INDUSTRY.

It is not hyperbole to state that judicial invalidation of the *Airline Merger Procedures* would be a prescription for chaos in airline labor relations. Indeed, Judge Williams in his dissent below, cited the destabilizing impact of the majority's decision on the airline industry as Aircon and the RAA had argued as *amici* below:

> [I]nvalidation of the merger procedures would likely place a cloud over the status of the certifications, voluntary recognitions, and revocation of certifications resulting in [previously decided applications], and could result in unnecessary litigation and disrupt the stable post-merger collective bargaining relationships now in place.
>
> The destabilizing impact of the loss of the merger procedures would be even more significant in the future. . . .
>
> [Before the merger procedures, carrier decisions made without NMB clarification] frequently resulted in unresolved disputes, litigation and potential disruptions of airline operations.

29 F.3d at 675; BN petition at 46a.

This Court has long recognized that questions of whether one union or another union is the proper representative of a group of employees is "an explosive problem." *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303 (1943). Partly as the result of the 1978 deregulation of the airline industry, there has been a proliferation of mergers and other cor-

porate transactions that continually raise RLA representation questions. Many of the most difficult labor disputes in the post-deregulation airline industry have involved the impact of corporate transactions on union representation and collective bargaining.

The Board reacted to this proliferation of merger-related representation disputes with its decision in *TWA/Ozark*, 14 NMB 218 (1987). That decision clarified the Board's policies with respect to the effect of mergers on existing union certifications and established interim "merger procedures," which were formalized in the *Airline Merger Procedures* that same year. *Airline Merger Procedures*, 14 NMB 388 (1987). Both the interim and final procedures mandated *carrier notice* to the Board concerning pending transactions, so the Board could *sua sponte* determine the impact of the transaction on existing NMB certifications.

Under *TWA/Ozark* and the *Airline Merger Procedures*, the Board has been remarkably successful in resolving potentially divisive representation disputes that invariably arise from corporate mergers or similar transactions. The Board has decided 16 airline industry merger cases since 1987.[7] Those 16 cases have resolved the representation of almost 100 different crafts or classes on the industry's largest airlines—American, Delta, Federal Express, TWA, and USAir.

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[7] *USAir/Shuttle, Inc.*, 19 NMB 388 (1992); *Pennsylvania Airlines/Allegheny Commuter*, 19 NMB 362 (1992); *SAHSA/TAN*, 19 NMB 17 (1991); *Command Airways/Nashville Eagle*, 18 NMB 372 (1991); *Air Wisconsin/Aspen Airways*, 18 NMB 336 (1991); *Federal Express/Flying Tiger Line*, 16 NMB 433 (1989); *Metroflight/Chaparral Airlines*, 18 NMB 56 (1990); *USAir/Piedmont*, 16 NMB 412 (1989); *British Airways/British Caledonian Airways*, 16 NMB 17 (1988); *Braniff/Florida Express*, 15 NMB 294 (1988); *USAir/PSA*, 15 NMB 135 (1988); *Alaska Air/Jet America*, 15 NMB 42 (1987); *Midway Airlines/Air Florida*, 14 NMB 447 (1987); *Delta Airlines/Western Airlines*, 14 NMB 291 (1987); *American Airlines/Air California*, 14 NMB 379 (1987); *TWA/Ozark*, 14 NMB 218 (1987).

Most merger-related representation disputes have been resolved by the Board determining which of the existing, pre-merger union certifications apply to the new, post-merger carrier. Minority unions have had their certifications terminated by the Board only where the union was unable to demonstrate sufficient employee support among the combined, post-merger craft or class. *See, e.g., Delta/Western,* 14 NMB 291 (1987). Where the size of merging workforces have been comparable, the Board has deferred action on existing certifications pending an election to determine the majority representative. *See, e.g., Federal Express/Flying Tiger,* 16 NMB 433 (1989); *USAir/Piedmont,* 16 NMB 412 (1989). As the 16 cases illustrate, the Board has used the *Airline Merger Procedures* to resolve live representation disputes, arising among employees, concerning who is the majority representative of the combined craft or class of employees under Section 2 Fourth of the Act, 45 U.S.C. § 152 Fourth.

Prior to the NMB's promulgation of the *Airline Merger Procedures,* representation disputes in the airline industry had proliferated in the federal courts. *See, e.g., Air Line Employees Ass'n v. Republic Airlines, Inc.,* 798 F.2d 967 (7th Cir.), *cert. denied,* 479 U.S. 962 (1986); *Int'l Broth. of Teamsters v. Tex. Int'l Air,* 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.,* 656 F.2d 16 (2d Cir. 1981); *Int'l Ass'n of Machinists v. Northeast Airlines,* 536 F.2d 975 (1st Cir.), *cert. denied,* 429 U.S. 961 (1976); *Broth. of Railway and Steamship Clerks v. United Air Lines, Inc.,* 325 F.2d 576 (6th Cir. 1963). The federal courts routinely declined to resolve such disputes citing the NMB's exclusive jurisdiction over representation matters.

One such dispute involving the Delta-Western merger came before Justice O'Connor. The Ninth Circuit enjoined the Delta-Western merger less than 24 hours before its consummation. *IBTCHWA, Local Union No. 2707 v.*

Western Air Lines, Inc., 813 F.2d 1359 (9th Cir. March 31, 1987), *vacated and remanded*, 484 U.S. 806 (1987). Justice O'Connor stayed the Ninth Circuit's injunction pending the filing and disposition of a writ of certiorari. Justice O'Connor concluded that the Circuit's decision was contrary to "the great weight of the case law suppor[ting] the proposition that disputes as to the effect of collective bargaining agreements on representation in an airline merger situation *are representation disputes within the exclusive jurisdiction of the National Mediation Board*" and that the Circuit's divergence from this principle would likely prompt at least four Justices to vote to grant certiorari. *Western Air Lines v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305, 1307 (April 2, 1987) (O'Connor, J., in chambers) (emphasis added). Soon after this 1986-87 litigation, the NMB adopted its interim merger procedures, and resolved the representation issues presented by the Delta-Western merger. *Delta Airlines/Western Air Lines*, 14 NMB 291 (1987).

Judicial invalidation of the *Airline Merger Procedures* potentially would raise the issue of the retrospective impact on *Delta/Western* and the 15 other decided merger cases—involving almost 100 NMB representation determinations. Labor relations inertia and the fact that many unions joined in "carrier invocation" of the *Airline Merger Procedures* may, as a practical and legal matter, limit such retrospective challenges.[8] But at a minimum, invalidation of the *Airline Merger Procedures* will cast a cloud of uncertainty over many merger-related representation determinations of the NMB.

The prospective destabilizing impact of the *en banc* decision is even more important. If the *Airline Merger*

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[8] The *amici* are aware of one case, *May et al. v. Shuttle, Inc. et al.*, C.A. No. 94-1019 (SS), in which a collateral challenge to the NMB's *USAir/Shuttle*, 19 NMB 388 (1992) decision is being pursued by a group of former Shuttle employees based upon the *en banc* decision.

Procedures are not available, how will transaction-related disputes concerning union representation be resolved in future mergers? In the absence of Board direction, carriers and unions may be forced to return to the pre-*Merger Procedures* approach, which regularly resulted in unresolved disputes, litigation and potential disruptions of airline operations. *See TWA/Ozark*, 14 NMB at 233.

An even more destabilizing potential outcome of the panel decision would be multiple, minority union representations within a single craft or class on an air carrier, the pattern that the Respondents apparently espouse in the railroad context. If the *en banc* decision stands, a minority union in a merger could avoid having its certification extinguished simply by not invoking the NMB's Section 2 Ninth processes. Where a minority union is merged into a non-union craft or class (as in the *Delta/Western* merger), no labor organization will have any incentive to apply to the Board to terminate the minority union's bargaining rights. When two or more unions have been certified to represent employees in the same craft or class, the *en banc* decision invites the unions to make deals among themselves concerning post-merger preservation of minority union representation. As long as the unions are satisfied with their continued, partial representation and do not make formal application to the NMB, then under the *en banc* decision there would be no procedure to achieve a single representative for each craft or class and the Board, apparently, will be without jurisdiction over this obvious representation dispute.

Such a "balkanization" of airline representation has been expressly and wisely rejected by the Board.[9] In Aircon's and RAA's view such fragmented representation

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[9] "The pattern of representation which has resulted in the railroad industry has, in the Board's judgment led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of railroads to integrate operations and manage a single rail system . . . [T]he Board does not intend to foster a similar pattern of representation in the airline industry." *Republic Air Lines/Hughes Air Corp.*, 8 NMB 49, 54-5 (1980).

would produce great labor relations discord and unnecessary litigation, would prevent the operational integration of merged airlines, and would violate the RLA's statutory requirement of systemwide craft or class representation.[10]

II. THE AIRLINE MERGER PROCEDURES DO NOT RESULT IN "CARRIER-INVOKED" REPRESENTATION INVESTIGATIONS.

A central assumption of the *en banc* decision is that the *Railroad Merger Procedures* grant carriers standing to initiate "carrier-invoked" representation investigations despite the asserted absence of statutory authority to do so. In design and application, however, the *Airline* and *Railroad Merger Procedures* are an exercise of the Board's inherent power to determine, *after* a change in the corporate identity or composition of the carrier, the *continued* validity of certifications originally issued in representation proceedings clearly within the Board's jurisdiction. Thus, the lower court erroneously read the merger procedures as creating a "carrier-invoked" procedure, when, in fact, the Board has enforced the *Merger Procedures* as an exercise of the Board's own power to police its prior certifications.[11]

Ironically, the Board first adopted the *TWA/Ozark* interim merger procedures with the express purpose of *limiting, not expanding* carrier influence over merger-related representation issues. The Board found that under

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[10] Section 2 Fourth provides that: "The majority of any craft or class of employees shall have the right to determine who shall be *the representative* of the craft or class. . ." (emphasis added). This singular usage in the statute mandates a single post-merger representative, and provides an express statutory basis for the *Merger Procedures*.

[11] Despite the lower court's ruling, Aircon and the RAA believe that the Board has the authority to permit carriers to invoke representation procedures. *See Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 666-67 (1965). Nonetheless, that issue is not necessarily presented under the *Railroad* or *Airline Merger Procedures*.

its prior decision "carriers have interpreted the *Republic* case to give them independent authority to extinguish existing certifications held by organizations on the acquired carrier; to choose between recognition of organizations on its property or the acquired carrier; and to choose whether or not employees on the acquired carrier will be represented." 14 NMB at 233.[12] Thus, in the absence of the merger procedures, carriers, in effect, simply asserted the power to make *de facto* representation decisions.

In reaction, the Board exercised its statutory authority over representation issues by requiring carriers to give the Board notice of mergers and similar corporate transactions concurrent with required filings with other Federal regulatory agencies. *TWA/Ozark*, 14 NMB at 241-2; *Airline Merger Procedures*, 14 NMB at 390-1, Subpart B (1). Indeed, Aircon members, after the public announcement of corporate transactions, have been advised formally through letters from the NMB of their obligation to file under the *Merger Procedures*.[13]

Thus, it is inaccurate to view the *Railroad* or *Airline Merger Procedures* as giving carriers standing to present representation disputes to the Board—the central reason the *en banc* court found that the *Railroad Merger Procedures* exceeded the NMB's statutory authority. Rather, the Board has mandated that carriers give the Board

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[12] The *TWA/Ozark* decision was plainly intended by the Board to assist incumbent unions' interests in corporate transactions. Airline unions have sought aggressively to have the Board take jurisdiction and resolve "single carrier" issues presented by corporate relations between carriers. *See, e.g., Continental Airlines/ Continental Express*, 20 NMB 326 (1993); *Flagship Airlines, Inc.*, 20 NMB 139 (1993); *Henson Aviation, Inc.*, 18 NMB 441 (1991); *Precision Valley Aviation*, 18 NMB 486 (1991); *Eastern Airlines, Inc.*, 17 NMB 432 (1990).

[13] This Board-imposed filing requirement has a statutory basis in Section 2 Ninth, 45 U.S.C. § 152 Ninth, which provides: "The Board shall have access to and have power to make copies of the books and records of the carrier to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

notice of corporate transactions, so that the Board may *sua sponte* investigate and determine the effect, if any, on previously issued certifications. Any legal analysis of the Board's authority to issue and apply the *Merger Procedures* must be premised upon the accurate characterization of those procedures as an assertion of the Board's authority to determine the continued validity of its certifications.

III. THE RLA GRANTS THE BOARD AUTHORITY TO REVIEW THE CONTINUED VALIDITY OF BOARD-ISSUED CERTIFICATIONS WHEN CORPORATE TRANSACTIONS CHANGE THE IDENTITY OR COMPOSITION OF THE CARRIER FOR WHICH THE CERTIFICATION WAS ISSUED.

The Board's jurisdiction to determine the post-merger validity of its previously-issued representation certifications, after a change in the carrier's corporate identity, is necessarily implied under Sections 2 Ninth and 2 Fourth of the Railway Labor Act. The *en banc* court's legal analysis is incorrect because it ignores both the Board's statutory authority to determine *who is the carrier* for representation purposes and the fact that corporate transactions invariably present the issue of which *existing certifications* are applicable to a post-merger carrier.

Section 2 Ninth of the Act is carrier-specific: it deals with disputes "among a carrier's employees" and requires the Board to certify representatives "to the carrier." That provision gives the Board the authority to determine, as an initial matter in representation disputes, whether an entity is a "carrier" under the Act's definitions, and then issue a carrier-specific certification to a union. *See, e.g., Delpro Co. v. Brotherhood of Railway Carmen*, 519 F. Supp. 842 (D. Del. 1981), *aff'd*, 676 F.2d 960 (3d Cir. 1982), *cert. denied*, 459 U.S. 989 (1983).

The Board's statutory authority for the *Merger Procedures* is not based upon a new representation application from a group of employees, but rather, is derivative of the Board's authority to issue the original, carrier-specific

certifications which are affected by the corporate transaction.[14] As the Board has correctly concluded, "the creation, change, and the termination of representation rights are within the province of the Board under the Railway Labor Act." *Airline Merger Procedures*, 14 NMB at 389. Mergers present the question of whether Board-issued, carrier-specific certifications are still valid under the Section 2 Fourth requirement of systemwide representation, and the Board has concluded that it has the authority under Section 2 Ninth to resolve such issues.

The courts have clearly and consistently held that the NMB has exclusive jurisdiction of representation disputes and that the courts have no jurisdiction to adjudicate the continued validity of Board-issued certifications. *See Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943).[15] The Respondents' ultimate argument, adopted by the D.C. Circuit, is that the NMB has no jurisdiction to modify or terminate its own certifications, *unless* a union invokes the representation procedures with a new dispute. But, the Railway Labor Act provides no

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[14] The Board's authority in this area is analogous to that of any administrative agency to retain jurisdiction over a matter after initial resolution. *See, e.g., Penn Central Merger Cases*, 389 U.S. 486, 501, 521 (1968).

[15] As Petitioners BN and NRLC have noted, the *en banc* decision's conclusion otherwise is in conflict with a decision of the Sixth Circuit upholding the *Railroad Merger Procedures*. *See Brotherhood of Maintenance of Way Employees v. Grand Trunk Western Railroad*, 961 F.2d 1245 (6th Cir. 1992); BN Petition at 23-25; NLRC Petition at 17-18. Moreover, the *en banc* decision is inconsistent with the D.C. Circuit's own prior decisions—including a decision by Judge Edwards, author of the *en banc* decision—giving effect to NMB actions changing, amending or terminating previously-issued certifications. *See International Longshoremen's Ass'n v. NMB*, 870 F.2d 733 (D.C. Cir. 1989) (reviewing and remanding to the Board a case in which the NMB *sua sponte* terminated previously issued certification); *Association of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432 (D.C. Cir. 1994) (Edwards, J.) (determining contractual impact of NMB termination of certifications in *USAir/Shuttle*, 19 NMB 388 (1992)).

basis for concluding that the certified union should have the unilateral power to determine the continued validity of its own "license" to represent employees.[16]

The ultimate result of Respondents' position and the *en banc* decision is that the Board would have the power only to issue certifications, and no statutory authority to determine that a certification is no longer valid, *even when the carrier for whom it was issued has merged with another carrier or no longer exists.* That truncation of Board authority makes no sense as a matter of national labor policy, and there is no basis for the Court to find that Congress intended such a limitation on the NMB's authority under Section 2 Ninth.

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[16] A Board-issued certification is a "license" to represent certain employees of a carrier, and the Board's role is analogous to a licensing agency. At common law, a licensing agency's authority to issue licenses implicitly includes the authority to revoke the licenses. *See,* 51 Am. Jur. 2d § 58 Licenses and Permits; 53 C.J.S. § 51 Licenses; *Mounts v. Chafin,* 411 S.E.2d 481, 487 (W.Va. 1991); *Woodbury v. Municipal Council of Gloucester,* 61 N.E.2d 647 (Mass. 1945); *Butcher v. Maybury,* 8 F.2d 155 (W.D.Wash. 1925).

CONCLUSION

The Court should grant review to determine whether Congress' intent to make the Board the sole arbiter of representation disputes under the Act includes Board authority to continue, modify, or terminate those certifications when the carrier's identity or composition is changed through a corporate transaction. Because that interpretation does no violence to the express language of Section 2 Ninth, and is consistent with the long-recognized exclusive Board jurisdiction of representation disputes, upon review the Court should reverse the 5 to 4 *en banc* decision of the D.C. Circuit.

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Nos. 94-890 and 94-907

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

BURLINGTON NORTHERN RAILWAY COMPANY,
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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1995

QUESTIONS PRESENTED

1. Whether the National Mediation Board's railroad merger procedures were subject to judicial review.

2. If so, whether the court of appeals erred in holding that certain provisions in the merger procedures violated the Railway Labor Act.

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In the Supreme Court of the United States

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v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-52a)[1] is reported at 29 F.3d 655. The vacated panel opinion (Pet. App. 54a-80a) is reported at 988 F.2d 133.

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[1] "Pet. App." refers to the appendix filed with the petition in No. 94-890.

The decision of the district court in No. 94-890 (Pet. App. 81a-87a) is unreported. The order of the district court in No. 94-907 (Pet. App. 103a-106a) is unreported. The decision of the National Mediation Board under review in No. 94-907 (Pet. App. 107a-130a) is reported at 18 N.M.B. 240.

JURISDICTION

The judgment of the court of appeals following rehearing en banc was entered on July 19, 1994. On October 11 and October 12, 1994, the Chief Justice issued orders extending the time for filing petitions for writs of certiorari to and including November 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The primary purpose of the Railway Labor Act (the Act), 45 U.S.C. 151 *et seq.*, is to facilitate the resolution of labor-management disputes in the rail and air transportation industries, and thereby to "avoid[] * * * industrial strife, by conference between the authorized representatives of employer and employee." *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 547 (1937); see 45 U.S.C. 151a. To that end, the Act requires that carriers, their employees, and unions "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. 152 First.

Under the Act, employees are guaranteed "the right to organize and bargain collectively through representatives of their own choosing," 45 U.S.C. 152 Fourth, the majority of any "craft or class of employees" who work for a particular carrier have the right to select a single

representative to serve as their exclusive bargaining agent, *ibid.*; 45 U.S.C. 152 Second; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961), and the carrier must negotiate, or "treat," with that representative to settle labor disputes, 45 U.S.C. 152 First and Ninth; *Virginian Ry.*, 300 U.S. at 548.

Section 2 Ninth, of the Act (45 U.S.C. 152 Ninth) plays a further and critical role in the statutory scheme by "set[ting] up the machinery" for selecting and certifying employee representatives, *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees* (*Railway Clerks*), 380 U.S. 650, 658 (1965), and by providing a mechanism for the resolution of disputes among the employees of a craft or class regarding the identity of their bargaining representative: Upon the request of any party to such a dispute, the National Mediation Board is obligated to conduct an investigation, and to determine and certify to both parties to the dispute, and to the carrier, the identity of the employees' representative.[2] The legal and

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[2] Section 2 Ninth provides in relevant part as follows:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the * * * Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties * * * the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carriers. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * * The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be

factual determinations made by the Board in its resolution of such a representation dispute are, as a rule, not subject to judicial review. *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 300 (1943). Board actions are reviewable, however, if taken "in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Railway Clerks*, 380 U.S. at 660 (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)); see also *International Bhd. of Teamsters* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.) (review of Board action available in "instances of constitutional dimension or gross violation of the statute"), cert. denied, 393 U.S. 848 (1968).

2. This case arose from the Board's attempt to address unique representational problems created by the merger of carriers in the airline and railroad industries. Because the employees of each carrier have their own bargaining representatives, when two or more carriers merge it will often be unclear who represents the crafts and classes of the resulting entity. It could be the representative of the employees who had worked on the surviving carrier's lines, or it could be the representative of the employees who had worked on the non-surviving carrier's lines. Often each representative asserts that it retains its certification with respect to the employees that work on its previously distinct lines. The confusion that arises regarding the identity of the authorized representative, as well as the accretion of multiple representations, poses significant practical problems that can frustrate the negotiation of collective bargaining agreements and hinder day-to-day labor-

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deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. 152 Ninth.

management relationships. See Pet. App. 91a-95a, 121a-122a.

The Board first addressed the representation problems that attend carrier mergers in the context of the airline industry, but its analysis was equally applicable to, and reflected the Board's substantial experience with, railroad mergers. In *Republic Airlines & Hughes Air Corp.*, 8 N.M.B. 49 (1980), the Board noted that railroad mergers had produced "uneven representation, duplication of effort, and confusion," and had "significantly reduced the ability of railroads to integrate operations and manage a single rail system." *Id.* at 54-55. In light of those difficulties, and the "inherent inefficiency" in maintaining multiple carrier systems solely for representation purposes, the Board held that the representation certifications on the acquired airline, Hughes Air Corporation, were extinguished "by operation of law" upon Hughes's acquisition by Republic Airlines. *Id.* at 56.

In practice, however, the *Republic Airlines* approach did not sufficiently stabilize labor relations, and it posed difficulties for employees and unions. See *TWA/Ozark Airlines*, 14 N.M.B. 218 (1987). Concluding that automatic extinguishment of certifications was "inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger," *id.* at 241, the Board promulgated interim procedures under which airline carriers involved in a merger, acquisition, or consolidation were permitted to petition the Board to determine the post-merger status of any certifications previously issued by the Board. Carriers were directed to provide notice to the Board of an impending merger at the time they applied to the Department of Transportation for permission to merge, or as soon as possible thereafter. *Id.* at 242-243. Those interim procedures

were later adopted on a permanent basis. See *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. 388 (1987).

In 1989, the Board proposed for the railroad industry merger procedures resembling those that it had adopted for the airline industry. Following a comment period, the Board issued its *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) (Merger Procedures) (reproduced at Pet. App. 90a-102a). The Board explained that prompt resolution of representation disputes connected with railroad mergers was necessary to effectuate the Board's "statutory mandate to certify only unions that represent the majority of a system-wide class of employees." *Id.* at 92a. Under the Merger Procedures, carriers are required to notify the Board of expected mergers, whereupon the Board undertakes to determine whether the merged carriers would operate as a single transportation system, and then to determine the status of outstanding certifications on the merged carrier. Pet. App. 96a, 99a. Incumbent unions on the affected carriers may comment concerning the carrier's submissions and other pertinent matters. *Id.* at 100a. The incumbent unions may also avail themselves of a simplified procedure for applying to represent employees on the full system. *Id.* at 97a-98a.

3. On December 8, 1989, the non-federal respondents filed suit against the Board in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief concerning the Merger Procedures. C.A. App. 9. The complaint in that action (No. 94-890) alleged that the Merger Procedures violated the Railway Labor Act, 45 U.S.C. 152 Ninth, and the

Administrative Procedure Act (APA), 5 U.S.C. 551, 553, because they permit persons other than employees or their representatives to invoke the services of the Board.[3] Petitioners, the National Railway Labor Conference and Burlington Northern Railroad Company (Burlington Northern), intervened as defendants.

The district court dismissed the challenge to the Merger Procedures for lack of jurisdiction, on the ground that neither the "face of the pleadings" nor a "peek at the merits" disclosed an error of constitutional dimension or a "gross violation" of the Railway Labor Act. Pet. App. 84a-85a (quoting *International Ass'n of Machinists* v. *TWA*, 839 F.2d 809, 811, amended, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988), and *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989)). The court found that Section 2 Ninth of the Act does not "impose a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier's request." Pet. App. 86a. The court noted in that respect that the Act does not state that the Board may determine and certify collective bargaining representatives *only* if an employee or representative requests its intervention. *Ibid.*

4. On June 14, 1989, Burlington Northern filed a petition with the Board requesting the Board to resolve several representation disputes that had resulted from the mergers between 1970 and 1985 of several railroads into Burlington Northern. C.A. App. 70. The petition

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[3] The complaint also alleged that the Merger Procedures violated the Board's own procedures, see 29 C.F.R. Pt. 1203, as well as the Due Process Clause of the Fifth Amendment. The district court rejected those claims, Pet. App. 81a, 86a n.3, and respondents did not appeal the dismissal of those claims.

alleged that although Burlington Northern operated as a single transportation system, "labor organizations representing employees who work under collective bargaining agreements have attempted to maintain a fragmented representational scheme and promoted minority representation." *Id.* at 73.

The Board's investigation revealed that the merger of 11 railroads into Burlington Northern had resulted in the existence of 85 certifications with respect to railroads that no longer existed. Pet. App. 109a. After determining that it had jurisdiction to entertain Burlington Northern's application, *id.* at 116a-120a, the Board found that a single transportation system existed on the Burlington Northern for purposes of the Railway Labor Act. *Id.* at 122a. Applying its "longstanding practice * * * to certify only unions that represent the majority of a system-wide craft or class of employees," *id.* at 123a, the Board extinguished all certifications on the predecessor railroads, effective as of the date of its decision, *id.* at 123a-124a. The Board then determined which unions represented the system-wide crafts or classes on the Burlington Northern. Pet. App. 124a-129a.

On May 16, 1991, the non-federal respondents brought an action in the United States District Court for the District of Columbia, challenging the Board's *Burlington Northern* decision. On September 12, 1991, the district court granted the Board's motion to dismiss that case (at issue in Burlington Northern's petition in No. 94-907) on the same grounds expressed in its earlier opinion rejecting respondents' facial challenge to the Merger Procedures. Pet. App. 105a.

5. The district court decisions were consolidated and reversed on appeal. Pet. App. 54a-80a. The Board sought and was granted rehearing en banc, but after rebriefing

and reargument, the court again reversed, in a 5-4 decision. *Id.* at 1a-52a, 53a. The court concluded that the Merger Procedures were subject to judicial review under *Leedom* v. *Kyne*, *supra*, because the Procedures constituted a "gross violation" of the Railway Labor Act. Pet. App. 10a. In the court's view, the nonreviewability rule of *Switchmen's Union* was designed only to protect the Board in the exercise of its circumscribed role under Section 2 Ninth—to investigate and resolve certification disputes brought to its attention by employees—and outside those confines the nonreviewability rule has no application at all. Pet. App. 7a-12a. The court also adopted the view taken by Judge Randolph (in a concurrence joined by all members of the majority) that the APA permits, and *Switchmen's Union* does not proscribe, judicial review of the Board's actions when the Board acts through APA-type rulemaking procedures. *Id.* at 4a n.1, 31a-34a.

Turning to the merits, the court of appeals found no support in the text of Section 2 Ninth for the Board's asserted authority to investigate and resolve representation issues in the absence of an employee request. Pet. App. 16a-21a. The court rejected the "suggestion that [the Board] possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area," noting that "[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Id.* at 28a-29a. The court found, in addition, that the legislative history and prior Board interpretations of the Act cut against the Board's position that it may resolve representation issues in the absence of a request by employees or their representatives. *Id.* at 21a-28a. The court then remanded respondents' challenge to the Merger Procedures for entry of

declaratory and injunctive relief, and remanded respondents' challenge to the Board's *Burlington Northern* decision for reconsideration in light of the court's analysis of the Merger Procedures. *Id.* at 30a.

Judge Williams, joined by three other judges in dissent, disagreed both with the majority's application of the nonreviewability doctrine and with the majority's view that the Board's initiation of certification procedures under the Merger Procedures exceeded the Board's statutory authority. See Pet. App. 35a-52a. Judge Williams saw in *Switchmen's Union* no basis for distinguishing between the Board's resolution of a particular representational dispute—which is not subject to judicial review—and the Board's determination of what disputes it is authorized to resolve—which, under the majority's analysis, is subject to review. *Id.* at 40a-42a. He also saw no justification in *Switchmen's Union* for distinguishing for purposes of reviewability between the Board's exercise of authority in an adjudication and its promulgation of rules of general application. In Judge Williams' view, such a distinction, made by the concurrence (and adopted by the majority), will merely dispose the Board against the use of notice-and-comment rulemaking procedures. *Id.* at 36a-39a. On the merits, the dissent found nothing in the text, history or underlying purposes of the Railway Labor Act to preclude the Board from undertaking to resolve certification issues in circumstances other than those (*i.e.*, upon the request of an employee or employee representative) in which the Board is affirmatively required by Section 2 Ninth to act. *Id.* at 45a-52a.

ARGUMENT

1. To the extent that the court of appeals relied on *Leedom* v. *Kyne*, *supra*, in determining that it had

jurisdiction to review the validity of the Merger Procedures, the mode of analysis it employed is consistent with this Court's teaching. The court of appeals acknowledged the highly deferential standard of review accorded decisions of the Board, and it recognized that Board actions can be reviewed and reversed only in the most extraordinary of circumstances. See Pet. App. 10a (acknowledging that "[j]udicial review of [Board] decisions is one of the narrowest known to the law," and that "'courts have no authority to review [Board] certification decisions in the absence of . . . a gross violation of the Railway Labor Act'").[4] Although the Board does not agree with the court's conclusion that provisions in the Merger Procedures that permit the Board to initiate a representation investigation violate the Act—grossly or otherwise—that disagreement does not warrant this Court's review. We have been informed by the Board that it is considering alternative ways to address the representational problems that arise from carrier mergers and consolidations.

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[4] The court of appeals stated that this case did not involve a review of the merits of a particular certification decision, but involves instead an analysis of the threshold question whether the Board "ha[d] * * * jurisdiction to act at all." Pet. App. 10a. Although the court noted that some other courts of appeals have held that questions respecting the Board's authority to act fall categorically outside of *Switchmen's Union*'s proscription against review, *id.* at 13a, the court recognized that "it may not always be a simple task to distinguish between Board actions which implicate the Board's threshold jurisdiction and those which are simply an erroneous exercise of functions legitimately entrusted to the Board's discretion," *id.* at 14a. The court found no need to resolve whether jurisdictional questions invariably merit a different standard of review, however, because it concluded that the Board's action in this case was reviewable even under the restrictive standard employed in *Leedom* v. *Kyne*, *supra*. Pet. App. 15a.

Moreover, the basis of petitioners' legal argument in this Court is that although Section 2 Ninth of the Act imposes a duty on the Board to resolve a representational dispute when requested to do so by one of the employees (or employee representatives) who is a party to the dispute, it does not preclude the Board from addressing representational issues in other circumstances if the Board elects to do so. 94-890 Pet. 19-21; 94-907 Pet. 27-28. Petitioners do not argue that the Act confers on them a right, which the court of appeals has now abrogated, to have the Board address representational issues in the merger context in the absence of a request to do so by an employee or employee representative who is involved in a dispute.

2. The court of appeals also endorsed the concurrence's view that *Switchmen's Union* does not apply when the Board acts through APA-like rulemaking procedures. Although the Board believes, for the reasons stated by the dissent, that *Switchmen's Union* applies irrespective of whether the Board acts through rulemaking or adjudication, the decision below is of limited applicability because the Board rarely acts through formal rulemaking processes.

It is significant, in that respect, that the court of appeals ruled definitively only with respect to respondents' facial challenge to the Merger Procedures. The court did not overturn the Board's *Burlington Northern* decision (at issue in No. 94-907), in which the Board actually adjudicated a representational dispute in accordance with the Merger Procedures; instead, the court remanded respondents' challenge to that decision to the district court for further consideration. It is unclear how, under the court of appeals' analysis, the district court is expected to rule on respondents' challenge to the Board's application of the Merger

Procedures in the context of representational issues involving a particular carrier. Until the district court rules on the matter, issues respecting the Board's *application* of the Merger Procedures will not be presented clearly for review.

3. Finally, there are no conflicts among the courts of appeals on any of the issues presented by these cases. Neither the railroad Merger Procedures nor the airline merger procedures have been facially challenged in any other circuit. Contrary to petitioners' assertions (94-890 Pet. 17-18; 94-907 Pet. 23-25), the Sixth Circuit's decision in *Brotherhood of Maintenance of Way Employees* v. *Grand Trunk Western R.R.*, 961 F.2d 1245 (1992), does not conflict with the decision below. To the contrary, the Sixth Circuit relied upon District of Columbia Circuit precedent in concluding that judicial review of National Mediation Board decisions is quite limited. See 961 F.2d at 1249. And although *Grand Trunk Western Railroad* also involved an application of the Merger Procedures, the parties in that case did not contest, and the court did not consider, the Board's authority to act to resolve a representational dispute when the Board's jurisdiction has not been invoked by an employee or an employee representative who is a party to the dispute—the key question on the merits in this case.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-890

NATIONAL RAILWAY LABOR CONFERENCE,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

The Railway Labor Executives' Association and its member unions that are respondents to the petition have waived their right to file an opposition to that petition and to the petition filed by the Burlington Northern Railroad Company in a companion case, No. 94-907. We do not understand that those respondents disagree with the *en banc* decision by the Court of Appeals invalidating the National Mediation Board's Railroad Merger Procedures, as they requested that result. But their failure to file an opposition does indicate that those unions and their Association do not oppose review of that decision by this Court so as to obtain a definitive decision of the issues.

On the other hand, the Solicitor General for the National Mediation Board (NMB) has filed a Brief in Opposition to both petitions which essentially disagrees with the

decision below in regard to both reviewability and to the merits of that decision, assuming reviewability; but opposes a grant of the petitions apparently because the issues are deemed not to be important enough to warrant review by this Court. We address that matter in this Reply.

1. "In adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between labor and management in this most important national industry." *Trainmen* v. *Chicago, R. & I. R. Co.,* 353 U.S. 30, 40 (1957). In order to further "the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations," Congress in § 2 Fourth of the Act "made explicit that the representative selected by a majority of any class or craft of employees should be the exclusive bargaining representative of all the employees of that craft or class," so that the "minority" were thus "deprived by statute of the right . . . to choose a representative of their own . . . ." *Machinists* v. *Street,* 367 U.S. 740, 759 (1961).

There can hardly be any doubt of the importance of those congressional policies or that the NMB itself regards its merger procedures as the most appropriate means of implementing those policies in the circumstances of a merger. Although a merger or consolidation of two or more carriers into a single system means that prior certifications of representatives on a component of that system are not based upon a choice by the majority of the system-wide craft or class, and could result in minority representation, the incumbent unions often were content with that status. Hence, as long as the NMB did not permit a carrier to invoke a representation investigation, its capacity to deal with the problem was "greatly limited . . . ." *Grand Trunk Western Railroad Co.,* 17 N.M.B. 282, 298 (1990). In short, as the NMB stated in its *Burlington Northern* decision now before this Court, one

"of the purposes of the Act is to ensure labor stability in the railroad industry"; "craft or class questions, as well as the question of who is the authorized or designated representative, may arise" from mergers; and resolution of those questions by the NMB "promotes labor stability." See Pet. App. H at 119a.

Indeed, the importance of resolution by the NMB of such issues is graphically portrayed by the Statement of the Case in the Opposition, at 4-5, including recognition that the "confusion that arises regarding the identity of the authorized representative, as well as the accretion of multiple representations, poses significant practical problems that can frustrate the negotiation of collective bargaining agreements and hinder day-to-day labor-management relationships." We submit that a decision striking down procedures adopted by a federal agency for the purpose of remedying such disruptions of stable labor-management relationship in the railroad and airline industries is sufficiently important to justify review by this Court, even if the legal bases for that decision were much less questionable than in the present case. This is particularly so because of the importance of uninterrupted rail transportation to the economy and the public interest as a whole; and thus of the efficient working of the machinery provided by the Railway Labor Act so as to promote its primary purpose of preventing railroad strikes.[1]

2. The Opposition asserts (at 11) that, although the NMB does not agree that its merger procedures "violate

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[1] The "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565 (1930). See also, *e.g.*, *Shore Line* v. *Transportation Union*, 396 U.S. 142, 148-149 (1969). Congress recognized as recently as June 26, 1992, in P.L. 102-306, that "it is essential to the national interest" to avoid railroad strikes that "threaten essential transportation services of the United States." 106 Stat. 260.

the Act—grossly or otherwise—that disagreement does not warrant this Court's review," as the Solicitor General has been informed that the NMB "is considering alternative ways to address the representation problems that arise from mergers and consolidations." There is no indication of what those "alternative ways" are or could be, but under the majority decision by the *en banc* Court of Appeals, they cannot authorize the NMB to address those representation problems in a representation investigation either at the request of a carrier or *sua sponte*. And, the NMB has concluded that its old procedure under which only employees or their union representatives may apply for a representation investigation has been a primary cause of those representation problems rather than their cure.

Moreover, any possibility of "alternative ways" did not prevent the NMB from vigorously defending its merger procedures in the lower courts, including petitioning for the *en banc* hearing after a panel of the Court of Appeals had invalidated those procedures. In that petition, the NMB asserted that the panel's decision not only was "of great legal significance," but also "unsettles numerous bargaining relationships established in the railroad industry since the advent of" those procedures in 1989, and almost certainly overturns the practice in the airline industry under similar procedures since 1987." Petition for Rehearing with Suggestion for Rehearing *En Banc* for the Appellee National Mediation Board, at 3.

In addition, even if "alternative ways" can be and are developed, they may well be subjected to judicial review under the Administrative Procedure Act (APA) if the *en banc* decision by the Court below is not reviewed and reversed by this Court. Although the Opposition regards that ruling to be wrong, it is said (at 12) to be "of limited applicability because the Board rarely acts through formal rulemaking processes." That is cold comfort when the Board does act through "formal rulemaking proc-

esses." Moreover, the NMB did not act in that manner with respect to its merger procedures, which are not regulations and have not been published in the Code of Federal Regulations.[2] It was sufficient for Judge Randolph, and thus for the majority of the *en banc* Court of Appeals, that those procedures constitute " 'agency statement[s] of general . . . applicability and future effect designed to . . . implement policy' (5 U.S.C. § 551(4))." Pet. App. A at 33a. And, he concluded for the Court that therefore those procedures could be reviewed under the APA, even if their application could not. Although we believe that ruling to be both unprecedented and clearly erroneous, see Pet. at 13-16, if left standing any "alternative ways" adopted by the NMB could be reviewed under the APA if they have general applicability and future effects designed to implement policy; which surely must be the case if those "alternative ways" are to have any utility in addressing the representation problems arising from mergers.

In *Switchmen's Union*, this Court pointed out that "the 'right' of the majority of any craft or class of employees" to choose a representative "is protected by § 2 Ninth, which gives the Mediation Board the power to resolve controversies concerning it"; that Congress did not provide for judicial review of the NMB's determinations in that regard, and that its plain intent was that there "was to be no dragging out of the controversy into other tri-

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[2] When those procedures were attacked in the District Court for noncompliance with the notice and hearing requirements of the APA, the NMB pointed out that they "are not regulations; they are simply a procedural framework under which the NMB can operate to expedite representation disputes after a merger has occurred," and thus come within the explicit exception, from the APA's requirements, for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." Memorandum in Support of Defendant National Mediation Board's Motion to Dismiss or, in the Alternative, for Summary Judgment, at 20 (citing and quoting 5 U.S.C. § 553).

bunals of law." *Switchmen's Union* v. *Board,* 320 U.S. 297, 300-301, 305 (1943); accord, *Railway Clerks* v. *Employees Ass'n,* 380 U.S. 650, 658-659 (1965). The controversy over the NMB's merger procedures has now been "dragging out" in "other tribunals" since 1989. If the *en banc* decision below is left standing, the efforts by the NMB to formulate procedures intended to protect the right of the majority of a craft or class to choose a representative will have been frustrated; and even if the NMB should succeed in devising "alternative ways" to address the serious representation problems arising out of mergers, further "dragging out" of the controversy in the courts may occur despite the decisions by this Court in *Switchmen's Union* and *Railway Clerks.* This surely is a matter of sufficient importance to justify review of the decision below by this Court.

3. The Opposition (at 12-13) deems it to be "significant . . . that the court of appeals ruled definitely only with respect to" the validity of the merger procedures; and that it "is unclear how, under the court of appeals analysis, the district court is expected to rule" upon the remand of the case challenging the application of those procedures on the Burlington Northern. That uncertainty arises from the fact that all five judges that comprised the majority expressly joined Judge Randolph's concurrence to the effect that, while *Switchmen's Union* precludes judicial review of certification decisions by the NMB, the merger procedures themselves are reviewable under the APA; but what is denominated as the Opinion for the Court, by Judge Edwards, bases reviewability upon the view that *Switchmen's Union* has been modified by *Leedom* v. *Kyne,* 358 U.S. 184 (1958). See Pet. at 8-9.

In our view, this is an added reason for granting the petition. The NMB rendered its decision in the *Burlington Northern* case on April 23, 1991, it has been "dragging out" in the courts for almost four years, and it may well require another trip to the Court of Appeals in order

to resolve that uncertainty if it is not resolved by this Court. Moreover, that uncertainty until resolved could affect future cases attacking other NMB rules and procedures under § 2 Ninth, or their application, or both. And, whatever may be true of the *Burlington Northern* case, the invalidation of the merger procedures, if not reversed, presumably will bar future applications of those procedures.

In that regard, the Opposition asserts (at 10-11) that to "the extent that the court of appeals relied on *Leedom* v. *Kyne*, *supra*, in determining that it had jurisdiction to review the validity of the Merger Procedures, the mode of analysis it employed is consistent with this Court's teaching." That is not very meaningful if, as the Opposition concedes, the extent of such reliance is "unclear," while APA review clearly may be had under the concurrence. But however that may be, the "mode of analysis" employed by Judge Edwards is contrary to the analysis by this Court in *Railway Clerks*, under which the *Leedom* v. *Kyne* doctrine applies only if the NMB violates a specific prohibition or a specific command in the Act. See Pet. at 11-13, and the Opposition at 4.

4. The Opposition also asserts (at 13) that there is no conflict with the decision by the Sixth Circuit in the *Grand Trunk Western* case (see the Pet. at 17-18). But while that case did not directly involve an attack on the validity of the merger procedures as such, it did involve a contention that the NMB did not have jurisdiction to entertain a petition by the carrier for clarification of an application of those procedures. See *Grand Trunk Western Railroad Co.*, 19 N.M.B. 226, 228-230 (1992). The Sixth Circuit expressly held that the carrier's petition to the NMB was "a proper procedure" as *Switchmen's Union* precluded review "of an action of the Board in issuing a certificate under § 2 Ninth." *Brotherhood of Maint. of Way Emp.* v. *Grand Trunk*, 961 F.2d 1245, 1248 (6th Cir. 1992). This appears to us to conflict squarely with

the holding by the court below in this case that the NMB does not have jurisdiction to investigate representation disputes on application of a carrier, and at least with the views expressed by Judge Edwards as to the reviewability of certification decisions under the merger procedures. But however that may be, the decision below is sufficiently important to justify review by this Court whether or not it conflicts with the decision by the Sixth Circuit.

CONCLUSION

This is an important case that both raises important issues of law and, unless reversed, has invalidated agency procedures intended to remedy significant representation problems arising out of mergers which have adversely affected the stability of labor-management relations in the railroad and airline industries. For the reasons stated in the petition and herein, the petition should be granted.

Respectfully submitted,

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